84-1416

No.

Office - Supreme Court, U.S.
FILED
MAR 6 1985
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1984

SUMCO MANUFACTURING CO., and SUMMIT GRINDING AND MACHINE CO.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Order of the National Labor Relations Board, as enforced by the United States Court of Appeals for the Sixth Circuit is confiscatory, contrary to law and due process of law.

2. Whether the Local Rules of the United States Court of Appeals for the Sixth Circuit, specifically Rule No. 22, are in conflict with the Federal Rules of Appellate Procedure, specifically Rule No. 30, and contrary to the rights guaranteed under the Fifth Amendment, of due process of law.

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No.

In the Supreme Court of the United States

October Term, 1984

SUMCO MANUFACTURING CO., and SUMMIT GRINDING AND MACHINE CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Sumco Manufacturing Co., and Summit Grinding & Machine Co., through their attorney, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on the backpay case (App. A) is reported at (6th Cir. 1984) 117 L.R.R.M. 2980. The opinion of the court of appeals in the unfair labor practice case (App. B) is unpublished. The decision and order of the NLRB in the backpay case (App. C) is not reported. The decision and order of the NLRB in the unfair labor practice case (App. D) is reported at 251 N.L.R.B. 427.

JURISDICTION

The judgment of the court of appeals (App. E) was entered on November 1, 1984. A petition for rehearing en banc was denied on December 7, 1984 (App. F). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 10(c) of the Labor—Management Relations Act of 1947 provides:

> * * * That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

3. 28 U.S.C. 2071.

> "Rule 47 of the Federal Rules of Appellate Procedure, adopted under that authority, authorizes the judges of the circuit to make rules of practice not inconsistent with FRAP," * * *

STATEMENT OF THE CASE

The Petitioners, Sumco Manufacturing Co., Inc. and Summit Grinding & Machine Co., are smaller corporations located in metropolitan Akron, Ohio. Sumco manufactures automobile jacks. Summit is a machine-tool shop with approximately 90% skilled employees. Both companies are bordering on insolvency.

From November 1977 through January, 1978 the employees of Sumco mounted an unsuccessful labor organizing drive, and engaged in a slowdown which resulted in increased costs, a loss of business and economic lay-offs. Of the fifty-one (51) employees at Sumco twenty-five (25) were laid-off in January, 1978.

The United Steelworkers charged that sixteen (16) of these employees were chosen for lay-off because of their union activity. The 8th Region of the NLRB issued a complaint alleging that Sumco and Summit Grinding Co., another corporation for which Sumco was assembling jacks, was a single employer. However, no such corporation as Summit Grinding Co. exists. In truth the Summit Grinding & Machine Co. was advancing operating capital to Sumco for assembly of its jack products. Sumco became unable to meet its production quota and make its payments to Summit and several banks from which it had made large loans. Lay-offs continued until, at present, only six (6) of the fifty-one (51) employees are left at Sumco.

Between February and April, 1978 Summit Grinding & Machine Co. offered all twenty-five (25) employees, who had been laid-off from Sumco, jobs with full seniority and benefits, and transferred all Sumco employees over to Summit Grinding & Machine Co. All laid-off employees except

three (3) accepted employment at Summit and later quit without notice with one exception, Ruth Duncan, who is still employed. Duncan offered testimony revealing that the union coerced these other employees to quit the jobs at Summit. Some worked as much as ten (10) months before quitting.

A hearing was held in 1980 at which the union presented its signed cards and failed to show a majority. By combining the two companies in order to support the erroneous claims of lay-offs out of seniority, the NLRB and the Union undermined the majority they may well have had at Sumco. Administrative Law Judge John C. Miller refused to order the company to bargain with the union declaring it a minority. However, he ruled against the alleged joint Respondent on all other aspects of the complaint noting the "lay-offs were economically motivated" and that the Respondent's seniority policy was "legitimate and non-discriminatory". In fact, he ordered reinstatement to and back pay for jobs that did not, and still do not exist. Back pay should not have been awarded under those circumstances (*See, NLRB v. Carolina Mills* (4th Cir. 1951), 28 L.R.R.M. 2323). Furthermore, there was no basis for the NLRB to find that the offers of reinstatement to Summit were not valid, and certainly those who accepted, and later quit, would not be entitled to back pay (*See, NLRB v. Aycock* (6th Cir. 1967), 65 L.R.R.M. 2352).

In the effort to save Sumco, Summit Grinding hired several employees to do a "timestudy" on the Sumco jack line to try out new operations and machinery. NLRB alleged that this was a discriminatory practice and awarded back pay and reinstatement for that reason. The record shows that this study was done because the slowdown by

union members had left Sumco unable to compete and unaware of its capabilities to produce jacks profitably. Therefore, Sumco did not err in trying new, objective employees for the jack operation (*See, Precrete, Inc.*, 132 N.L.R.B. No. 91 (1961), 48 L.R.R.M. 1473).

While the Administrative Law Judge John C. Miller found that the layoffs were for economic reasons he also ruled that sixteen (16) employees were laid-off because of union animus. However, he further ruled that nine (9) employees, who were laid-off at the same time were not discriminated against. In fact, three (3) of those nine (9) employees had signed union cards (App. G). Furthermore, the record shows that management testified, under oath, that they were instructed not to interfere with the union's campaign. With this in mind, John C. Miller only suspicioned union animus on the part of the Respondent.

When a company has indicated in some way that it has no prejudice against a union (Harry Foley advised the supervision and management of Sumco that the employees had a right to organize a union if they wanted to and the management was not to interfere in any way with their rights), a violation of Section 8 (a) (1) cannot be basis for violation of Section 8 (a) (3) of the Act. Circumstances that merely raise a suspicion of unlawful motives are insufficient (*Entwistle Mfg. Co. v. NLRB* (4th Cir.), 120 F.2d 532. *Interlaken Iron Corp. v. NLRB* (7th Cir. 1942), 11 L.R.R.M. 608. *Hazel Atlas-Glass Co. v. NLRB* (4th Cir. 1942), 10 L.R.R.M. 413). Where motivating cause is at issue the chief guide is the testimony of the employer under oath—the onus is on the Board to establish the falsity of his explanation (*Wennonah Cotton Mills Co., Inc.*, 16 L.R.R.M. 299).

While the Petitioners offered both testimony and documentary evidence at both NLRB hearings in this case as to the truth about the offers of reinstatement to all of the twenty-five (25) laid-off employees for jobs at Summit with full benefits and seniority (App. H), the Administrative Law Judges in both proceedings credited the hearsay testimony of union witnesses, in both proceedings, to the contrary. The Petitioners contend that the substantial evidence proves that Summit's offers of reinstatement were valid and in good faith.

NLRB's contention that several of the employees refused offers of reinstatement because of "the limited nature of the employment offer" is in conflict with Board policy (*See, Hemp & Co. of Illinois,* 9 N.L.R.B. No. 41 (1938), 3 L.R.R.M. 282; *Novelty Peanut Co.,* 69 N.L.R.B. No. 126 (1946), 18 L.R.R.M. 278).

In short, the decisions and orders of the NLRB, as enforced by the U.S. Court of Appeals for the Sixth Circuit, were not based on substantial evidence contained in the records of the proceedings (*See, Universal Camera Corp. v. NLRB,* 40 S. Ct. 2951, 27 L.R.R.M. 2373; *NLRB v. Walton Mfg. Co.,* ..... S. Ct. ..... (1962), 49 L.R.R.M. 2962).

Moreover, proceedings before the NLRB which totalled five (5) days, with transcripts totalling nearly one thousand (1,000) pages before it, the U.S. Court of Appeals for the Sixth Circuit issued a one-page order enforcing the Board order in the unfair labor practice case after informing counsel for the Respondent that "no oral argument was necessary because a decision had already been made".

Following the U.S. Court of Appeals for the Sixth Circuit's review of the unfair labor practice case and shortly before the backpay hearing, the Court, under the

direction of Chief Judge George Edwards, instituted a new rule of procedure which did not exist previously. The rule reads as follows:

> *RULE 22*: BRIEFING AND ARGUMENT IN NLRB APPLICATIONS FOR ENFORCEMENT
>
> In an application for enforcement by the National Labor Relations Board under Rule 15 (b), Federal Rules of Appellate Procedure, the respondent(s) will be considered the petitioner(s), and the NLRB considered the respondent, for the purposes of briefing and oral argument, unless the court orders otherwise.

After briefs had been filed according to the above rule, the Respondent was ordered by the Court to produce a joint appendix. A series of motions ensued (App. I) and finally the Respondent was ordered to file a joint appendix on or before September 14, 1984, or a decision of enforcement of the NLRB order would be forthcoming.

All attempts by the Respondent to obtain a designation of the record from NLRB were to no avail. NLRB refused to cooperate. The Respondent, unable to submit a joint appendix, waived oral argument and the Court issued a summary judgment enforcing the NLRB order; citing failure to file a joint appendix as a reason for that judgment.

While *Rule 22* deals with briefing and oral argument, it is silent on a joint appendix. In *Sixth Circuit Rule 11* it is stated in part: "The purpose of a joint appendix is to facilitate the efforts of each judge in studying the briefs in a meaningful way." Therefore, without a joint appendix, it is entirely unlikely that the three-judge-panel of the Court could have competently studied the substantial

evidence, as required, to render a decision in the back pay case.

The Petitioners, in this matter, contend that *Sixth Circuit Rule 22* is designed to shift the burden of proof to the Respondent(s) in NLRB cases, reversing the normal practice of labor litigation which has been established nearly fifty (50) years, and is contrary to due process of law as guaranteed in the Fifth Amendment.

The NLRB was and is fully aware that there have been and still are only six (6) employees working at Sumco Manufacturing Co., all positions held by more senior employees than the alleged discriminatees. There are no jobs at Sumco. The NLRB has ruled that offers from Summit are not valid. Therefore, to date, compliance is at a stand-still. Furthermore, NLRB has discovered several discrepancies in the back pay amounts which Sumco or Summit cannot possibly pay (App. J).

These threats of liens, contempt proceedings and incarceration are meaningless because the employer is nearly bankrupt. There are no jobs available and there are no assets to pay for the backpay award. In order to carry out the mandate in this case, NLRB would have to confiscate all equipment and property of the employer. There would be no jobs for the present senior employees or for the discriminatees and the financial record shows that there would be little or no money for back pay purposes. Enforcement as it stands would be purely punitive rather than remedial (*See, NLRB v. Coats & Clark, Inc.* (5th Cir. 1957), 39 L.R.R.M. 2405).

REASONS FOR GRANTING THE PETITION

This case presents serious questions as to NLRB's authority in issuing orders for reinstatement with back pay and the scope under which those orders are reviewed by the U.S. Circuit Courts.

This unprecedented ruling seriously misconstrues this Court's decision in *Universal Camera Corp. v. NLRB,* 40 S. Ct. 2951, 27 L.R.R.M. 2373, regarding the appellate courts' duty to "take into account whatever in the record fairly detracts from evidence supporting the Board".

Local *Rule No. 22* of the Sixth Circuit Court of Appeals is in direct conflict with *Rule 30 FRAP* in that, according to the Court, it places the burden of proof of innocence on the appellee; rather than the proof of guilt on the appellant, and coupled with the refusal of NLRB to cooperate in the formulation of a joint appendix, seriously hampers the Court from reviewing the "substantial" evidence in the case, resulting in a denial of due process. Especially when the Court refuses to hear the case on its merits and the record.

The final decision of the Court in this matter alleges that the "respondent . . . appears to reargue the unfair labor practice case . . . .", but respondent's argument was developed solely to show that there should have been *no* back pay ordered in this case. Furthermore, the Respondent's Answer to the Backpay Specification was complete in this contention and offered the alternative of no back pay.

The Orders of Backpay Are Confiscatory, Contrary to Law and Due Process of Law

The very fact that there are no jobs at Sumco prevents the employer from making any offers of reinstatement. Yet the interest and backpay has been ordered to run until offers of reinstatement are made. Arguendo, if the employer can never create jobs for the discriminatees, the backpay liability may run on forever with a confiscatory, punitive result. The employer has shown substantially, that the order for backpay is contrary to law and contends that the action of Court and the attitude of the Board in this case deny due process of law under the Fifth Amendment.

The Procedural Order of the United States Court of Appeals For the Sixth Circuit Constitutes a Denial of Procedural Due Process of Law

The Petitioners, having exhausted every avenue, contend that it was impossible to comply with the Court's order to file a joint appendix without the designation of the Record by NLRB.

The result of all motions by the counsel for the employer were general denials by the Court which offered little or no interpretation of its local rules (App. I). Therefore, the judgment (App. E) was based solely on the record submitted by the NLRB and the Court had no opportunity to review substantial evidence which detracted from the Board's findings of fact.

This unprecedented ruling in support of Sixth Circuit *Rule 22* in this case constitutes a gross miscarriage of justice and due process under the Constitution of the United States, and, a flagrant disregard for the Federal Rules of Appellate Procedure.

CONCLUSION

The rulings in this case are not only in conflict with other United States Courts of Appeals, but they are also in conflict with this Court's applicable decisions.

The procedures adopted by the Sixth Circuit Court of Appeals in NLRB proceedings so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's powers of supervision.

In the interest of returning to normal enforcement of NLRB orders the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals For the Sixth Circuit

(Filed November 1, 1984)

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO., INC., and
SUMMIT GRINDING COMPANY,
Respondent.

ON APPLICATION for Enforcement of an Order of the National Labor Relations Board.

Before: EDWARDS and CONTIE, *Circuit Judges;* and PHILLIPS, *Senior Circuit Judge.*

PER CURIAM. This is the second time this case has been brought before this court for decision. In the first instance, on an unfair labor practice charge, this court entered an order finding "that the findings and order of the Board are supported by substantial evidence on the record as a whole. It is therefore ORDERED that the order of the Board in this case be and it hereby is enforced."

Subsequently there was controversy between the Board and Sumco over the amount of backpay owed to the

employees who had been adversely affected by discriminatory hiring of new employees or the transferring of other employees. The Regional Director thereupon issued a backpay specification and an Administrative Law Judge found that the respondent, while denying the appropriateness of the backpay formula and computation, presented no alternative formula or figures. Thereupon the General Counsel's motion for summary judgment was granted. The Board thereafter affirmed the ALJ's decision providing that backpay would continue until such time as valid offers of reinstatement were made to the discriminatees.

On consideration of the briefs and record filed in this appeal, we hold that the argument advanced by respondent appears essentially to reargue the unfair labor practice case which has previously been finally decided against the companies concerned.

What is currently before this court is a petition for enforcement of the Board's order determining the amount of backpay due 16 named discriminatees. We recognize that the company belatedly has sought to raise contentions concerning backpay which should have been raised before the Board. These contentions, however, cannot be adjudicated on appeal by this court.

Enforcement of the Board's order, dated August 22, 1983, which adopted the recommended order of the ALJ and ordered that respondent Sumco Manufacturing Company, Summit Grinding Company, Mogadore, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended order of Michael O. Miller, ALJ, dated February 15, 1983, is hereby granted by this court. An additional reason for this order is that counsel for the respondent failed to file a joint appendix on or before September 14, 1984, as ordered by this court.

APPENDIX B

Order of the United States Court of Appeals For the Sixth Circuit

(Filed May 19, 1982)

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING COMPANY, INC., AND SUMMIT GRINDING COMPANY,
Respondent.

ORDER

Before: EDWARDS, *Chief Judge,* CONTIE, *Circuit Judge,* HORTON, *District Judge.*

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the record of the Board, the briefs and oral argument of the parties. Upon due consideration thereof the Court finds that the findings and order of the Board are supported by substantial evidence on the record as a whole.

It is therefore ORDERED that the order of the Board in this case be and it hereby is enforced.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

Supplemental Decision of the National Labor Relations Board Re Backpay

(Dated February 15, 1983)

Case No. 8-CA-11702

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

SUMCO MANUFACTURING CO., INC.
SUMMIT GRINDING COMPANY,

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

SUPPLEMENTAL DECISION - BACKPAY

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: On August 25, 1980, the National Labor Relations Board, herein called the Board, issued its Decision and Order[1] in the above-entitled proceeding wherein it directed that Sumco Manufacturing Co., Inc. Summit Grinding Company, herein called Respondent, its officers, agents, successors, and assigns, offer reinstatement to and make whole 16 named employees for any loss of earnings they incurred as a result of Respondent's discrimination against them. The Board's Order was enforced by the United States Court of Appeals

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1. 251 NLRB 427.

for the 6th Circuit in an unpublished decision issued on June 11, 1982. Controversies over the dates upon which the backpay entitlement of certain employees began and the amounts of backpay to which they are entitled having arisen, the Regional Director for Region 8 of the Board, on August 31, 1982, issued and duly served a Backpay Specification and Notice of Hearing upon Respondent. Respondent filed a timely answer admitting certain allegations of the specification and denying others.

Upon the entire record, including my observation of the witnesses and their demeanor, and upon consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

A. *The Board's Decision*

Following a hearing before then Administrative Law Judge (now Board Chairman) John C. Miller on January 23-26, 1979, and a Decision issued by him, the Board found, *inter alia*, the following:

1. Summit and Sumco constitute a single employer.

2. The layoff of January 4, 1978 was economically motivated.

3. Six employees, Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover, were discriminatorily selected for inclusion among those to be laid off, out of seniority, in violation of Section 8(a)(3) and (1) of the Act. The Board determined that they are entitled to backpay from the date of their layoff until they receive valid offers of reinstatement.

4. Respondent discriminated against ten laid off employees, Sheila Smith, Dale Carder, Phyllis Young, Jayne

Freiman, Diane Fridley Hahn, Connie Votaw, Mary Adamson, Linda Booth, John Mesko, and Bonnie Thomas, by hiring new employees, or by transferring employees from Summit, to work in the jack division of Sumco before recalling them. As to these discriminatees, the backpay period was determined to begin with the date that employees from Summit were transferred in or new employees were hired to fill the jobs which they, in accordance with seniority, should have been recalled to fill. It was to run until they receive valid offers of reinstatement.

5. The Board found that Respondent had offered to consider the laid off employees of Sumco for employment with Summit as new probationary employees without their prior benefits. That offer, it was concluded, did not constitute a valid offer of reinstatement and was itself discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act. Respondent was directed to make valid offers of reinstatement to all of the above named employees. At least four employees, Tanner, Hoover, Adamson, and Mesko, were expressly found to have rejected offers of employment because they were unlawfully conditional.

The Board's findings and conclusions in the underlying unfair labor practice case are binding and may not be relitigated in a subsequent backpay proceeding.[2]

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2. *Schorr Stern Food Corp.*, 248 NLRB 292, 295 (1980); *Brown and Root, Inc.*, 132 NLRB 486, 492 (1961), enfd. 311 F.2d 447, 451 (8th Circuit 1963). Respondent's efforts to relitigate substantial portions of the underlying case, on this record and in its brief, are to no avail and must be disregarded. Similarly entitled to no weight are its accusations of bias directed against both the Administrative Law Judge who heard the unfair labor practice case and the Court which granted enforcement to the Board's Order.

B. *Gross Backpay and Interim Earnings*

General Counsel alleged gross backpay for the discriminatees for 1978 based upon the hourly wage rates they had last been paid, with an adjustment for a 15-cent per hour general wage increase granted by Respondent as of July 1, 1978. Gross backpay for all subsequent quarters was determined by utilizing the average of the earnings of named employees. Respondent's answer to the backpay specification, given its most liberal interpretation, might be deemed to generally deny the gross backpay formula and computation. Its answer did not state the basis for any disagreement or detail any position as to the formula which it would contend to be appropriate. Neither did it, at hearing, seek to establish any alternative gross backpay formula or figures. Accordingly, General Counsel's motion for summary judgment on the issue of gross backpay, based upon the requirements of Section 102.54(b) and (c) of the Board's Rules and Regulations,[3] was granted. The gross backpay is found to be as alleged in the specification.

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3. In relevant part, the Board's Rule, Section 102.54(b), states:

> . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

Section 102.54(c) states, *inter alia*:

> . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

The specification, as amended, sets forth the interim earnings of the discriminatees and the General Counsel made the discriminatees available to Respondent for examination at the hearing.[4] Respondent, who bears the burden of proof on the affirmative defense that discriminatees willfully incurred losses by unjustifiable refusals to seek or accept new employment,[5] made no contention that the employees failed in their obligation to seek or accept interim employment and did not dispute the interim earnings put forth by the General Counsel.

C. *The Backpay Periods*

As noted, the Board found that the backpay period for 6 named employees, Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover, began on January 4, 1978 when these employees were discriminatorily selected out of seniority for layoff. The Board found that the backpay periods for the remaining employees, Shelia Smith, Dale Carder, Phyllis Young, Jayne Freiman, Diane Fridley Hahn, Connie Votaw, Mary Adamson, Linda Booth, John Mesko, and Bonnie Thomas, began on the dates when they were replaced either by newly hired employees or by employees transferred from Summit; they would have been recalled from the January 4 layoff according to their seniority but for the discrimination.

Comparing Joint Exhibit 1, the January 1, 1978 Sumco seniority list, with General Counsel's Exhibit 2, the record of those hired by Summit between January 1, 1978 and January 1, 1979, in light of other employment records

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4. Except for Jayne Freiman and Sheila Smith, who were not present at the hearing.

5. *Inland Empire Meat Company*, 255 NLRB 1306 (1981); *Aircraft & Helicopter Leasing and Sales, Inc.*, 227 NLRB 644 (1976).

(General Counsel's Exhibit 3(a) and 3(b)) and the Board's Decision,[6] it is clear that General Counsel has established, as the dates upon which the backpay periods commenced, the following:

1. Mary Adamson, who was hired on July 30, 1975, was entitled to recall on February 15, 1978, the date that Virginia Richmond was hired.

2. Connie Votaw, who was hired on May 13, 1976, was entitled to recall on February 15, 1978 when Connie Earley was hired.[7]

3. Linda Booth, hired June 1, 1976, was recalled on February 13, 1978, ahead of the reinstatement date to which her seniority would have entitled her.

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6. The Board specifically found that the following named individuals were hired to work in the jack division on the dates following their names: Jesse Bibby-March 1, 1978; Trena Eldridge-March 3, 1978; Patricia Gaines-March 6, 1978; and, Rhonda Russell-March 6, 1978.

7. Respondent's contention that Connie Earley, as well as Trena Eldridge, Patricia Gaines, Rhonda Russell, Narda Sullivan, Nancy Reeves, and Vickie Johnson were hired on a temporary basis in order to perform a time-study on an experimental jack line at Summit must be rejected. This issue was fully litigated in the underlying proceeding and Respondent's contentions in regard thereto were rejected. See, for example, the Decision of Administrative Law Judge John C. Miller, *supra*, at pages 436-441, where this defense was discussed and rejected and a specific finding was made that Eldridge, Gaines, and Russell were hired to work in the jack division, which jobs "could have been filled by the Sumco employees on layoff." Additionally, Judge Miller found that Sullivan and Johnson were hired and the record herein establishes that they filled jobs on the jack line in the same manner as did Eldridge, Gaines, and Russell. See also pages 725-728 of the transcript in the underlying case and Respondent's brief in support of exceptions to the Administrative Law Judge's Decision, page 11. It should be noted that Respondent's personnel records, in evidence as General Counsel's Exhibits 3(a) and 3(b), establish that Bibby, Eldridge, Gaines, and Russell were hired to work in the jack division on the first shift and contain no reference to any experimental program or time-study.

4. Jayne Freiman, who was hired June 1, 1976, was entitled to recall on March 1, 1978, the date that Jesse Bibby was hired. Respondent contended that Bibby had been hired to operate a tow motor, a job which Respondent would not give to a woman. Public policy precludes giving any credence to a defense based upon an admitted predilection to violate Title VII of the Civil Rights Act of 1964. Moreover, the record established that his job was basically that of stock clerk.

5. Dale Carder, who was hired on September 14, 1976, was entitled to recall on March 3, 1978, the date on which Trena Eldridge was hired.

6. Sheila Smith, who was hired on March 28, 1977, was entitled to recall on March 6, 1978, when Patricia Gaines was hired.

7. Diane Fridley Hahn, who was hired on April 20, 1977, was entitled to recall on March 6, 1978, the date on which Rhonda Russell was hired.

8. John Mesko, who was hired on June 2, 1977, was entitled to recall on March 21, 1978, the date on which Narda Sullivan was hired.[8]

9. Phyllis Young, who was hired on August 15, 1977, was entitled to recall on March 28, 1978, the date Vickie Johnson was hired.[9]

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8. General Counsel had contended that Mesko was entitled to recall on March 28, 1978, the date that Vickie Johnson had been hired. General Counsel's Exhibit 2, however, establishes the hire of Narda Sullivan on the earlier date to work on the first shift in the jack division. No explanation is furnished for why Mesko would not have been entitled to the job Sullivan filled on that date. The substitution of Sullivan for Johnson in the backpay calculation has a domino effect, moving up the date on which the next most senior employee was entitled to recall.

9. See footnote No. 8 above. General Counsel had contended that her entitlement to recall began on April 3, 1978.

10. Bonnie Thomas was the least senior of the discriminatees, having been hired on August 31, 1977. She returned to work on February 13, 1978.

All of the above named newly hired employees filled jobs in the jack division. The Board has already found (The Remedy, page 441) that the "jobs in the jack division could have been filled by the Sumco employees on layoff." Assuming that this issue is even open to further consideration, I find this conclusion to be amply supported by the record herein. The discriminatees had worked in that division at Sumco. A number of them testified herein that they had worked at all or nearly all of the jobs within that division; they further testified that the jobs within the jack division were easily learned. No contrary evidence was offered.

The Board concluded, as previously noted, that valid offers of reinstatement had not been made to the discriminatees prior to the hearing before Administrative Law Judge John C. Miller and directed, as part of its remedy herein, that such offers be made. General Counsel contends that no such offers have been made. Therefore, he argues, the backpay periods for these employees have yet to toll; their entitlement to backpay continues. Respondent does not contend that it made any offers of reinstatement to the discriminatees subsequent to the hearing on the underlying case. It merely reiterates the contentions, previously rejected, that the reinstatement offers it had earlier made were valid. I am bound by the underlying decision herein and must find, in agreement with the General Counsel, that Respondent has never made valid offers of reinstatement to these employees. The

backpay periods, except as may be indicated herein with regard to individual employees, continue.[10]

Diminution of Backpay Liability

On January 1, 1978, just prior to the economic layoff, Sumco had approximately 51 employees and Summit had

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10. Were the issue before me, I would most certainly find that Respondent's letters to the employees, inviting them to submit new applications for jobs at Summit and promising them consideration for job openings commensurate with their abilities, constituted, at best, limited and conditional offers. I note herein, as Judge John C. Miller earlier pointed out, that two employees received different letters, letters purporting to offer them employment at Summit at the rate of pay which they had received at Sumco. One of these employees, Mary Adamson, had testified in the initial proceeding that she had been told that her employment at Summit would be as a new employee, without benefits or seniority; the letter which she received is not inconsistent with such a statement and my colleague credited her testimony, finding that she had expressly rejected Respondent's offer because of its limited nature. The second employee to receive such a letter, Sandra England, had testified in that proceeding that while she had worked on the first shift during her entire employment at Sumco, the only job Respondent offered her was on the second shift. This would not have constituted an offer of reinstatement to the same or a substantially equivalent position. I note further, that while England's testimony before me, to the effect that she had received the letter which only invited the employees to make application at Summit and indicating that she had never been offered a job, conflicts both with the copy of the letter sent to her which is contained in the original record and with her testimony in that hearing, no contrary conclusion would be warranted. Whichever version of her testimony is credited, the offers made to her, if any, were conditional and Respondent never contradicted any of her assertions.

Moreover, it is worth noting that in the original hearing, Summit's plant manager, Wilford Jones, testified that when the Sumco employees were filling out their applications for employment at Summit, "They were told they were hiring into a new company and starting out new again." This policy, he contended, was changed in March of 1978, but he acknowledged that any employees who "quit before we got around to telling them that they had received all their other benefits, et cetera, . . . would not have known that they received their benefits when they came back." While he testified that subsequent to March of 1978 everyone did get their insurance, earlier wages, and seniority, he never expressly stated when, if ever, the employees were told of this policy change.

85. Respondent submitted lists, allegedly prepared from the Summit payroll records (in May of 1982), which purport to show a generally decreasing trend in the number of Summit employees through May 30, 1982. Comparison of those lists against the January 1, 1978 payroll lists for both Sumco and Summit indicate the following:

A. As of June 30, 1978 there were 103 employees (and two supervisors) listed. Of these, 51 had been employed by Summit prior to January 1, 1978. 20 had transferred from Sumco to Summit, including three with less seniority than several of the discriminatees. Four were reinstated discriminatees and the remainder, 28, had apparently been hired in the first 6 months of 1978.

B. On July 1, 1979, according to Respondent's list, there were 79 employees at Summit. Of these, 43 employees from prior to July 1, 1978, three were reinstated discriminatees, seven were employees hired during 1978, and the remainder were presumably hired in the first 6 months of 1979.

C. By January 1, 1980, according to Respondent's summary of payroll records, only 61 persons were employed by Summit. Of these, 29 had been employed prior to January 1, 1978, two were reinstated discriminatees, four had been hired during 1978, 19 other were hired before July 1, 1979, and eigh' had presumably been hired since July 1, 1979.

D. Summit's employee complement fell even further, to 47, by July 1, 1980. Of these, 32 were employees from the period prior to January 1, 1978, one was a reinstated discriminatee, five had been hired during 1978, and the remaining employees, nine, had apparently been hired sometime after January 1, 1979.

At least one of those employed since prior January 1, 1978, Avalina Rogacs, had less seniority than at least one of the discriminatees.

E. By January 1, 1981, Respondent's employee complement had increased to 57. Included in those 57 are 34 from the period prior to January 1, 1978, one reinstated discriminatee, and 11 who had been hired during 1978. The remainder were apparently hired sometime later. At least two of the employees who transferred from Sumco to Summit during 1978, who were on the payroll as of January 1, 1981, had less seniority than at least one of the unreinstated discriminatees.

F. The payroll summary as of May 30, 1982 purports to show that there were but 34 employees as of that date. Of these, 20 were employed by the joint employer prior to January 1, 1978, two were among those who had been hired in 1978, and 12 apparently were hired subsequent to that date.

Aside from certain hand-written notes on the list of employees hired during 1978 and on the list of Sumco employees as of January 1, 1978, the records submitted by Respondent do not show what jobs the employees held or were capable of performing or in what division they worked. Harvey Rector, Respondent's labor relations consultant, testified that of the 34 employees on the May 31, 1982 payroll, "only about 6 or 7" worked in the jack division.

Pointing to the foregoing records, Respondent argues on brief that it has "established the fact that the jack division never reached a second shift after the layoff and both the jack division and Summit continued to lose business and made layoffs throughout the years 1978-79-80-81 and

82."[11] To the extent that Respondent intended to show that there were not jobs available for the discriminatees at various times during the backpay period, General Counsel argues that it "has fallen woefully short" of meeting its burden of proof. I must agree. Respondent's records, such as they are, do not indicate that there were no jobs which the discriminatees could have filled, particularly jobs in the jack division but also in other divisions, where some discriminatees were placed when they did return, at least until May 28, 1982. For each period shown, it is clear that there were a sufficient number of jobs being filled by employees hired since January 1, 1978 to have provided work for all of the discriminatees. There is no indication whether the employee complements in the periods between the dates of the summaries were greater or less than shown on those dates. There was no testimony regarding whether any layoffs which may have occurred between January 4, 1978, and May 28, 1982, were permanent or temporary. Rector's testimony, concerning the size of the jack division as of May 28, 1982, even if credited and deemed adequate to otherwise carry its burden of proof, would only establish the employee complement as of that week. One cannot glean from Respondent's evidence when, if ever, there ceased to be available work which could have been performed by the discriminatees.

As the Respondent has failed to sustain its burden of proving that it no longer had work which some or all of the discriminatees could have performed, I must

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11. These records say nothing about a second shift and Rector offered no testimony on that subject in the hearing on the backpay specification. Moreover, this statement in Respondent's brief is contradicted by the testimony of Elmore Hamrick in the original hearing, wherein he acknowledged that a second shift was operating at the time that Sumco employees were transferred to Summit

reject its implicit contention that its backpay liability must be reduced in some manner in relation to the reduction in its workforce.

E. *Discriminatees Who Accepted Reinstatement and Subsequently Terminated Their Employment*

Nine employees returned to work at Summit prior to the initial hearing herein. Of these, two, Ruth Duncan and Bonnie Thomas, have remained in Respondent's employment since that time (Thomas until April 23, 1982) and General Counsel concedes that whatever "shortcomings were present in the terms of [their] reinstatement have been rectified." As to them, General Counsel seeks no backpay beyond the dates of their reinstatement. Similarly, General Counsel concedes that Beverly Claar and Jane Freiman, who respectively worked for Respondent for 22 and 8 months following their reinstatements, removed themselves from the labor market for reasons unrelated to the conditions of their reinstatement. General Counsel seeks no backpay for either of them beyond the first quarter of 1978.

Five employees, Linda Booth, Sheryl Legg, Diane Fridley Hahn, Sheila Smith, and Agnes Tanner, all returned to work at Summit prior to the initial hearing and all terminated their employments, the General Counsel contends, for reasons related to the inadequacy of their reinstatement. As to each of them, General Counsel seeks backpay not only for the periods prior to their reinstatement but also for the periods following their terminations.[12] Respondent appears to contend that the reinstate-

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12. General Counsel also seeks a further order that Respondent offer them, and the other discriminatees, reinstatement. Such a request falls outside the purview of the backpay

(Continued on following page)

ment of these employees ends Respondent's backpay liability and that any subsequent termination of them cannot be considered in this proceeding because, at most, these would have been terminations in the nature of constructive discharges requiring the filing of new charges and the issuance of new complaints.

As General Counsel pointed out in his brief, discriminatees Booth, Hahn, Legg, and Smith had all returned to work and quit prior to the date of the unfair labor practice hearing. Their terminations and the circumstances surrounding them were fully explored on the record which was before the Board. The Board specifically ordered that valid offers of reinstatement been made to these employees. However, that Order went on to state, "In the event any of said employees have been reemployed, the remedy as to them will be modified accordingly." General Counsel asserts that the foregoing quoted language refers only to Duncan and Thomas who were still working. If that is so, then the Board's Order precludes reconsideration of this question as to the other four.[13] However,

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Footnote continued—

specification and hearing before me. Inasmuch as the Board's Order, requiring that Respondent make valid offers of reinstatement to these employees, has been enforced and as Respondent's noncompliance is clear, it would seem that the appropriate avenue to secure this relief lies in an action before the enforcing court.

13. This contention is supported, at least in part, by the Remedy Section of the Administrative Law Judge's decision. Therein it was specifically recommended that Respondent be ordered to offer reinstatement to Smith, Fridley Hahn, Legg, and Tanner. Backpay was ordered for those (and others) as well as Booth, Claar and Thomas. As Booth had returned and quit in the same manner as Smith, Fridley Hahn, and Legg, and as Tanner was still employed by Respondent at the time of the hearing, like Claar and Smith, it would appear that the Administrative Law Judge's inclusion of Tanner with, and exclusion of Booth from, the group of employees to whom Respondent was obligated to make valid offers of reinstatement was an inadvertent error.

as the Board's Order might be deemed ambiguous in regard to the intended remedy for these employees, I shall treat the issue herein.

Linda Booth had worked at various jobs in the jack division prior to the discrimination against her, including jack building which she characterized as the most difficult job on the line. Jack building was not the job she was doing at the time she was laid off. She returned to the jack division at Summit on February 13 as a jack builder and worked just a few days more than one month. On her return, she had been told that she was considered as a new employee and that she did not retain her original seniority date. Summit's personnel record for Booth, which reads: "Start 2-13-78" and which refers to Sumco as "Other Experience", fully corroborates her testimony.[14] She quit on March 17, 1978, because Respondent rejected her request to be assigned to some work other than building jacks and because of her understanding, never corrected by Respondent, that she was a new employee.

Diane Fridley Hahn was reinstated to a position in Summit's machine division on April 11. She was told by whomever was responsible for the hiring at Summit that it was a new job, that she was starting over and that she did not retain the seniority she had acquired during her employment at Sumco. She was also told that she would have to wait 30 to 60 days to pick up her insurance benefits. While she had been paid $2.80 per hour when she was laid off, her starting wage at Summit was only $2.65 per hour.[15] Fridley Hahn worked

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14. I credit her testimony in this regard, noting that it is consistent with the testimony of Wilford Jones in the original hearing.

15. I credit her testimony as it is both consistent with the testimony of Jones, described above, and supported by the

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until July 25, 1978, when she quit. She claimed that she was motivated to do so by the fact that she was making less money than she had made at Sumco and because she had lost her seniority. The payroll record indicates that she had received a wage increase to $2.85 per hour on May 15, 1978 and another to $3.00 per hour on July 3, 1978. That same record bears a notation following the date of her quit: "quit-moving back to W. Virginia, would not rehire". Fridley Hahn denied telling Respondent that she was quitting for this reason; according to her testimony, she had only mentioned visiting in W. Virginia when she informed her foreman of her termination. Her testimony is uncontradicted. She also testified that it was her belief that the loss of seniority would affect how fast she would receive raises and her eligibility for vacations.

Sheryl Legg filled out a new application at Summit Grinding and was told by Hamrick and by the individual who took her application that she would be starting as a new employee, on a new job, with a new company, as if she had never been there before. Moreover, she was told that she would have to wait 90 days to be covered by hospitalization insurance.[16] Legg started at Summit,

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Footnote continued—

Summit payroll record which indicates a lower starting wage, lists a starting date of April 11, 1978 and refers to Sumco under prior employment. While Respondent points to Hamrick's denial that he told employees that they would be starting anew, I note that Fridley Hahn did not attribute the statement to him and Hamrick, himself, testified that he did not do the hiring at Summit.

16. When asked by Respondent whether the waiting period was not 30 days, Legg denied it. Respondent offered no affirmative evidence to establish that there was only a 30 day waiting period or that the existence of such a shortened waiting period would not still establish that these individuals were being treated a[illegible]ew employees. When shown a copy of Re-

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working in a separate building, filing the welds on jack stands. This job, which she had never done before, required her to carry hot pieces of metal, without any gloves being provided, and exposed her to repeated burns from flying sparks generated by the nearby welding work. She quit on June 7 because of her dissatisfaction with the conditions of her employment.

Sheila Smith was hired by Summit on April 27, 1978. She received the same hourly rate that she had received at the time of her layoff from Sumco. Her personnel record indicates that she was assigned to Summit's die shop. Like the Summit personnel records of the above discussed employees, Smith's lists her starting date as April 27, 1978 and Sumco as her prior experience. She quit on May 27. Smith was unavailable to the General Counsel at the time of the backpay hearing and thus offered no testimony to explain her quit. In the original hearing she had testified that she quit because she "was mad at being cussed at and my production being up and a job under impossible conditions, and I couldn't handle it."

Agnes Tanner was one of those employees found to have been discriminatorily selected for layoff. She returned to Summit on April 3, 1978 and, as with the other employees involved herein, her personnel record for Summit shows that date as the start of her employment; it also

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Footnote continued—

spondent's payroll records, (Respondent's Exhibit 4(k)), which purported to show that Respondent was giving her credit for a May 27, 1975 seniority date, Legg concisely summed up the situation as follows: "What this says and what I was told is two different things." Finally, I note that this record does not show what Respondent contended. Legg was shown one page, which was her Sumco record. Attached to that was Summit's personnel record for Legg which expressly states, "Start: 4-17-78" and lists under "Other experience" the following, "Sumco-layoff Die Shop." This entry fully corroborates Legg's testimony.

shows Sumco as her prior experience. These entries support the conclusion that she returned as a new employee. She was not told anything about her seniority when she returned except that there would be a waiting period before her hospitalization insurance would become effective. In February of 1979, she took a leave of absence for two months and returned from that leave in mid-April, 1979. Sometime later, she asked to be allowed to take her vacation on what she understood to be her anniversary date, June 10, based upon the date on which she started working in 1972. Plant manager Jones denied her request, informing her that because of the layoff (found to be discriminatory) and because of the leave of absence she had taken, her anniversary date was being changed to a date later in the year. Tanner's testimony is uncontradicted.

As General Counsel correctly points out, an offer of reinstatement to a job which is not substantially equivalent to that held prior to the discrimination does not toll backpay even when, as here, the employee accepts the offer, if that employee subsequently quits because of dissatisfaction with the inadequate reinstatement. *J/B Industries, Inc.*, 245 NLRB 538 (1979) (employee worked two months at a non-equivalent job before quitting); *Marlene Industries Corporation, et al.*, 234 NLRB 285 (1978) (employee worked two or three weeks at the non-equivalent position); *Glass Guard Industries, Inc.*, 227 NLRB 1140 (1977). Moreover, as the Board noted in *Marlene Industries, supra*, at 291, the reinstatement of an employee without according her the seniority she had acquired prior to the discriminatory discharge does not satisfy Respondent's obligation to reinstate an employee to a substantially equivalent position. Based upon all of the foregoing I must conclude that neither Booth, Fridley Hahn, Legg, nor Tanner were reinstated to substantially equivalent employment. As

evidenced by the statements made to them by Respondent's agents and by their personnel records, each was reinstated without the seniority to which they were entitled. Moreover, Booth and Fridley Hahn were reinstated to jobs different from and more difficult or onerous than the jobs they had been on when they were laid off. Moreover, I am satisfied that the evidence establishes that each of these employees terminated her employment because of dissatisfaction with the inadequate reinstatement. The case of Agnes Tanner warrants no different conclusion notwithstanding that she worked for 14 months before quitting. It was not until shortly before she quit, when Jones told her that the period covering her discriminatory layoff was being deducted from her accumulated seniority, that she knew of the inadequacy of her reinstatement. It was as a direct result of the acquisition of that knowledge that she quit.

Accordingly, I find that the acceptance of employment at Summit by Booth, Fridley Hahn, Legg, and Tanner did not toll Respondent's backpay liability. That liability continues until such time as Respondent makes these employees valid offers of reinstatement. Such earnings as they may have received from Respondent, of course, are set off against that backpay liability. As Sheila Smith did not testify herein, the question of whether her backpay tolled will be held in abeyance pending resolution at a subsequent proceeding in the event that she becomes available as a witness within a reasonable time.

F. *Conclusions*

Based upon the foregoing and the entire record herein I conclude that Respondent has not made valid offers of reinstatement to any of the discriminatees involved herein. I further find that the total net backpay due these discrim-

inatees through the end of the second quarter in 1982 is as follows:[17]

Mary Adamson	$ 3,395.19[18]
Linda Booth	$ 8,704.55
Dale Carder	$ 2,268.77
Beverly Claar	$ 616.00[19]
Ruth Duncan	$ 2,154.45
Sandra England	$ 7,924.74
Jane Freiman	$ 515.20
Diane Fridley Hahn	$15,483.23
Betty Hoover Morhidge	$14,166.92
Sheryl Legg	$18,301.45
John Mesko	$ 6,233.74[20]
Sheila Smith	$25,442.58[21]

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17. The backpay is based on the computations set forth in the Appendix which is attached to this Decision. The gross backpay figures in the Appendix are based on those set forth in the specification, on which summary judgment was granted. Minor adjustments, consistent with this Decision or to correct the General Counsel's computations, have been made. The net interim earnings in the Appendix are based on those set forth in the specification as amended at hearing by the General Counsel, which were not challenged by Respondent.

18. Adamson's gross backpay has been reduced by one week, in quarter one of 1978, to reflect that she lost seven rather than eight weeks' backpay from February 13, 1978 until March 31, 1978.

19. Claar's backpay has been adjusted to correct inadvertent computational errors in the backpay specification.

20. Mesko's backpay has been adjusted to reflect his entitlement to reinstatement on March 21, 1978 rather than March 28, 1978. It is further adjusted to delete four weeks' of gross backpay erroneously included in the calculations for the first quarter of 1978.

21. Sheila Smith was not available to be examined by Respondent at the backpay hearing. Accordingly, it will be recommended that Respondent be required to pay the gross

(Continued on following page)

Agnes Tanner	$ 7,510.85
Bonnie Thomas	$ 0
Connie Votaw	$ 1,248.76
Phyllis Young	$ 3,133.20[22]

The total backpay due under the terms of this recommended Order is $117,099.33, plus interest.

Upon the foregoing findings of fact, conclusions of law, and entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

Footnote continued—

backpay amount due Sheila Smith to the Regional Director to be held in escrow for a reasonable period of time while further efforts are made to locate her. Jurisdiction will be retained for one year from the date of the Order herein and the General Counsel is herewith granted permission to move to reopen this matter with regard to her. If, after one year, Sheila Smith has not been located and made available for examination by the Respondent, the backpay claim in regard to her shall be dismissed unless good cause is shown to the contrary.

22. Young's backpay has been adjusted to reflect her entitlement to reinstatement on March 28, 1978 rather than April 3, 1978. She was not available to be examined by Respondent at the backpay hearing. Accordingly, it will be recommended that Respondent be required to pay the gross backpay amount due Phyllis Young to the Regional Director to be held in escrow for a reasonable period of time while further efforts are made to locate her. Jurisdiction will be retained for one year from the date of the Order herein and the General Counsel is herewith granted permission to move to reopen this matter with regard to her. If, after one year, Phyllis Young has not been located and made available for examination by the Respondent, the backpay claim in regard to her shall be dismissed unless good cause is shown to the contrary.

ORDER[23]

The Respondent Sumco Manufacturing Co., Inc., Summit Grinding Company, its officers, agents, successors, and assigns shall make the employees named above whole by the payment to them of the net backpay due through June 30, 1982, in the total amount of $117,099.33[24] plus interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977), accrued until payment of all backpay due. The backpay obligation shall continue until such time as Respondent makes valid offers of reinstatement to the above-named employees, the amounts of such backpay to be determined by further supplemental proceedings, if necessary.

Dated: Washington, D.C., February 15, 1983.

/s/ MICHAEL O. MILLER
Administrative Law Judge

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23. In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

24. The amounts due each employee being set forth in the Conclusion Section of this Decision, above, and in the Appendix, attached hereto.

APPENDIX[1]

NAME	I. YR./QTR.		II. GROSS BACKPAY	III. INTERIM EARNINGS	IV. NET BACKPAY
1. Mary Adamson	1978	1	$ 784.00	$ 0	$ 784.00
		2	1456.00	1061.61	394.39
		3	1534.00	1061.61	472.39
		4	1534.00	652.33	881.67
	1979	1	$ 1630.79	$ 1472.42	$ 158.37
		2	1941.05	1472.42	468.63
		3	1583.72	1472.42	111.30
		4	1596.86	1472.42	124.44
	Total				$ 3395.19
2. Linda Booth	1978	1	$ 448.00	$ 242.09	$ 206.31
		2	1456.00	0	1456.00
		3	1534.00	422.45	912.55
		4	1534.00	802.77	731.23
	1979	1	$ 1630.79	$ 1019.40	$ 611.79
		2	1941.05	1225.95	715.10
		3	1583.72	1456.07	127.65
		4	1596.86	433.13	1163.73
	1980	1	$ 1624.14	$ 206.78	$ 1417.46
	1981	2	$ 1749.19	$ 1681.06	$ 68.13
		4	1738.95	1190.17	548.78
	1982	1	$ 1489.00	$ 898.15	$ 590.85
		2	1433.33	1278.36	154.97
	Total				$ 8704.55
3. Dale Carder	1979	3	$ 1583.72	$ 664.00	$ 919.72
		4	1596.86	1184.00	412.86
	1981	2	$ 1749.19	$ 1632.00	$ 117.19
	1982	1	$ 1489.00	$ 670.00	$ 819.00
	Total				$ 2268.77
4. Beverly Claar	1978	1	$ 616.00	$ 0	$ 616.00
	Total				$ 616.00
5. Ruth Duncan	1978	1	$ 1339.20	$ 0	$ 1339.20
		2	799.20	16.05	815.25
	Total			(expenses)	$ 2154.45
6. Sandra England	1978	1	$ 1240.00	$ 0	$ 1240.00
		2	1300.00	0	1300.00
		3	424.00	0	424.00

1. Omitted from this Appendix are all quarters for which no backpay is due.

NAME	I. YR./QTR.		II. GROSS BACKPAY	III. INTERIM EARNINGS	IV. NET BACKPAY
	1979	3	$ 1218.25	$ 346.04	$ 872.21
		4	1596.86	324.11	1272.75
	1980	1	$ 1624.24	$ 410.43	$ 1213.81
		2	998.76	986.75	12.01
		3	1215.45	1113.60	101.85
		4	1259.89	1113.60	146.29
	1981	2	$ 1749.19	$ 1323.00	$ 426.19
		3	1591.55	1239.00	$ 352.55
		4	1471.38	1057.00	414.38
	1982	1	$ 1489.00	$ 1366.63	$ 122.37
		2	1433.33	1407.00	26.33
	Total				$ 7924.74
7. Jayne Freiman	1978	1	$ 515.20	$ 0	$ 515.20
	Total				$ 515.20
8. Diane Fridley Hahn	1978	1	$ 456.00	$ 0	$ 456.00
		2	165.60	0	165.60
	1979	2	$ 1941.05	$ 0	$ 1941.05
		3	1583.72	0	1583.72
		4	1596.86	0	1596.86
	1980	1	$ 1624.24	$ 0	$ 1624.24
		2	998.76	886.02	112.74
	1981	2	$ 1749.19	$ 0	$ 1749.19
		3	1591.55	0	1591.55
		4	1738.95	0	1739.95
	1982	1	$ 1489.00	$ 0	$ 1489.00
		2	1433.33	0	1433.33
	Total				$15,483.23
9. Betty Hoover Morhidge	1978	1	$ 1240.00	$ 0	$ 1240.00
		2	1300.00	0	1300.00
		3	1365.00	0	1365.00
		4	1365.00	0	1365.00
	1979	1	$ 1630.79	$ 520.40	$ 1110.39
		2	1941.05	1642.00	299.05
		3	1096.00	126.33	969.67
		4	737.00	0	737.00
	1980	1	$ 1624.24	$ 0	$ 1624.24
		2	998.76	0	998.76
		3	1215.45	0	1215.45
		4	1259.89	0	1259.89

NAME	I. YR./QTR.		II. GROSS BACKPAY	III. INTERIM EARNINGS	IV. NET BACKPAY
	1981	2	$ 1749.19	$ 1466.00	$ 283.97
		3	1591.55	1466.00	125.55
		4	1738.95	1466.00	272.95
	Total				$14,166.92
10. Sheryl Legg	1978	1	$ 1302.00	$ 0	$ 1302.00
		2	567.00	0	567.00
		3	1495.00	0	1495.00
		4	1495.00	0	1495.00
	1979	1	$ 1630.79	$ 0	$ 1630.79
		2	1941.05	0	1941.05
		3	1583.72	0	1583.72
		4	1596.86	0	1596.86
	1980	1	$ 1624.24	$ 0	$ 1624.24
		2	998.76	0	998.76
		3	1215.45	0	1215.45
		4	1259.89	0	1259.89
	1981	1	$ 1053.44	$ 1339.00	$ 0
		2	1749.19	1339.00	410.10
		3	1591.55	1339.00	252.55
		4	1738.95	1339.00	399.95
	1982	1	$ 1489.00	$ 960.00	$ 529.00
		2	1433.33	1560.00	0
	Total				$18,301.45
11. John Mesko	1978	1	$ 194.40	$ 0	$ 194.40
		2	1404.00	0	1404.00
		3	1534.00	0	1534.00
		4	1534.00	1191.00	342.57
	1979	1	$ 1630.79	$ 1190.58	$ 440.21
		2	1941.05	793.72	1147.33
		3	1583.72	445.26	1138.46
		4	1596.86	1564.09	32.77
	Total				$ 6233.74
12. Sheila Smith	1978	1	$ 440.00	$ 0	$ 440.00
		2	1166.00	0	1166.00
		3	1534.00	0	1534.00
		4	1534.00	0	1534.00
	1979	1	$ 1630.79	$ 0	$ 1630.79
		2	1941.05	0	1941.05
		3	1583.72	0	1583.72
		4	1596.86	0	1596.86
	1980	1	$ 1624.24	$ 0	$ 1624.24
		2	998.76	0	998.76
		3	1215.45	0	1215.45
		4	1259.89	0	1259.89

NAME	I. YR./QTR.		II. GROSS BACKPAY	III. INTERIM EARNINGS	IV. NET BACKPAY
	1981	1	$ 1053.44	$ 0	$ 1053.44
		2	1749.19	0	1591.55
		3	1591.55	0	1591.55
		4	1738.95	0	1738.95
	1982	1	$ 1489.00	$ 0	$ 1489.00
		2	1433.33	0	1433.33
	Total				$25,442.58
13. Agnes Tanner	1978	1	$ 1413.60	$ 0	$ 1413.00
	1979	4	$ 1106.00	$ 0	$ 1106.00
	1980	1	$ 1624.24	$ 1589.00	$ 35.24
	1981	1	$ 1053.44	$ 0	$ 1053.44
		2	1749.19	0	1749.19
		3	1591.55	0	1591.55
		4	1738.95	1300.00	438.95
	1982	2	$ 1433.33	$ 1309.85	$ 123.48
	Total				$ 7510.85
14. Bonnie Thomas			$ 0	$ 0	$ 0
	Total				$ 0
15. Connie Votaw	1978	1	$ 828.80	$ 0	$ 828.80
	1980	4	$ 1259.89	$ 839.93	$ 419.96
	Total				$ 1248.76
16. Phyliss Young	1978	1	$ 91.20	$ 0	$ 91.20
		2	1482.00	0	1482.00
		3	1560.00	0	1560.00
	Total				$ 3133.20

APPENDIX D

Decision and Order of the National Labor Relations Board

(Dated August 21, 1980)

Case 8-CA-11702

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUMCO MANUFACTURING CO., INC.
SUMMIT GRINDING COMPANY

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

DECISION AND ORDER

On April 15, 1980, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the Charging Party and the Respondents filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2]

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1. The Respondents have excepted to the Administrative Law Judge's finding that there is common ownership and financial control of Sumco Manufacturing Co., Inc., and Summit Grind-

(Continued on following page)

Footnote continued—

ing Company, because the Respondents contend that no corporation named Summit Grinding Company has ever existed. Rather, the Respondents assert that the correct name of the corporation involved in the takeover of Sumco Manufacturing Co., Inc., is Summit Grinding & Machine Co. However, we note that the Respondents specifically admitted that Summit Grinding Company was an Ohio corporation in their answer to the complaint in this case and never raised any issue as to the correct name of Summit Grinding Company until they filed exceptions with the Board. Therefore, we find their exceptions on this point to be untimely. Furthermore, we note that the Respondents have not contended that they have suffered any prejudice due to the use of an alleged incorrect name to refer to Summit Grinding & Machine Co. in this case, and it is clear that counsel for Summit Grinding & Machine Co. has actively participated at every step of the proceedings herein.

The Charging Party and the Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

2. In adopting the Administrative Law Judge's Decision in this case, we do not rely upon his statement in the fourth paragraph of sec. II,D,3(d), that "As a general rule, if an employer becomes more strict with employees after union organizing begins, it is deemed to be a reprisal for such union activities and is violative of the Act." Rather, we are satisfied that the record in this case supports the Administrative Law Judge's conclusions that the Respondents' threats to take away employee breaks were in fact made in retaliation against the employees' union organizing activities, especially noting that the Respondents have advanced no legitimate business reasons to justify such threatened changes in employee working conditions.

In par. 5 of the Conclusions of Law section of his Decision, the Administrative Law Judge failed to list the following independent 8(a)(1) violations which he had previously found to have occurred: a promise of a raise to an employee to deter him from supporting the Union and a statement creating the impression that employees' union activities were under surveillance, made by Donna Bolock; more stringent enforcement of plant rules in retaliation against employees' union activities and a statement that the reason for the layoffs was to get rid of union organizers, made by William Desatnik; and a threat to lay off and not recall union supporters, made by Dominic Romeo. We therefore correct these inadvertent omissions.

(Continued on following page)

of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Sumco Manufacturing Co., Inc., and Summit Grinding Company, Mogadore, Ohio, their officers,

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Footnote continued—

2. We agree with the Administrative Law Judge's conclusion that a bargaining order is not warranted in this case under *N.L.R.B. v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575 (1969), inasmuch as the General Counsel has not met her burden of proving that the Charging Party ever represented a majority of the employees in an appropriate unit. We note that there is insufficient evidence in the record to establish the number and identity of the employees actually employed in the appropriate unit after the payroll period ending February 26, 1978, and that, therefore, we are unable to determine whether or not the Charging Party ever attained actual majority status after that time via the subsequently signed cards which are in the record. The Charging Party contends in its exceptions, however, that despite its lack of majority status a bargaining order is nevertheless warranted in this case under *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979). We find that the conventional remedies provided in the Administrative Law Judge's Decision are sufficient to dissipate the effects of the Respondents' unfair labor practices in this case and, for the reasons set forth in our respective opinions in *United Dairy Farmers, supra*, decline to issue a bargaining order in the absence of any proof of actual majority status.

3. We find that a broad remedial order is warranted in this case, under the standard of *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), inasmuch as the Respondents here have engaged in numerous serious violations of Sec. 8(a)(1) and (3) of the Act and have thereby demonstrated a general disregard for the employees' fundamental statutory rights. Accordingly, we shall modify the Administrative Law Judge's recommended Order by inserting the broad "in any other manner" cease-and-desist language. We shall also modify the language of the Administrative Law Judge's recommended Order to conform with his Conclusions of Law. Finally, we shall modify the Administrative Law Judge's notice to conform with his recommended Order.

agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 1(b), (c), (d), and (e):

"(b) Discriminatorily hiring new employees for Summit, while former employees of Sumco are still laid off, in an attempt to displace employees who support the Union.

"(c) Belatedly offering laid off Sumco employees an opportunity to be considered for employment with Summit as probationary new employees without their old wages and fringe benefits because of their activities or support of the Union.

"(d) Interrogating employees about their union activities or support for the Union; threatening to discharge or lay off employees because of their union activities or support for the Union; threatening to close the plant if the Union became the employees' bargaining representative; stating that the reason for the layoffs was to get rid of the union organizers; stating that laid-off employees who supported the Union would not be recalled; creating the impression that employees' union activities were under surveillance; promising employees raises to deter them from supporting the Union; enforcing plant rules more stringently and threatening to take away employees' breaks in retaliation against their union activities.

"(e) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. August 21, 1980

.....

John A. Penello, Member

.....

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, concurring in part and dissenting in part:

I agree with my colleagues that the Respondents, in a successful attempt to undermine the employees' exercise of their Section 7 rights, committed serious and flagrant violations of Section 8(a)(1) and (3) of the Act.[4] However, I dissent from their refusal to grant a bargaining order, which is the only adequate remedy for the Respondents' egregious misconduct.

In response to the employees' attempt to secure union representation, the Respondents discriminatorily laid off union supporters and hired new employees to replace them. The Respondents, *inter alia*, interrogated employees about their union activities; threatened to discharge or lay off union supporters; threatened to close the plant should the employees select the Union; acknowledged that employees were laid off to get rid of the union organizers; created the impression of surveillance of union activities; made promises and threats to deter employees from selecting the Union; and imposed more onerous working conditions in retaliation for the employees' union activities. My colleagues apparently agree with the Administrative Law Judge that if a union majority had been established, a bargaining order would have been appropriate in light

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4. I would award interest on the backpay due in accordance with my dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

of the Respondents' serious unfair labor practices. However, because of the absence of proof of actual majority status, my colleagues find that the conventional cease-and-desist and offer-of-reinstatement remedy is sufficient to dissipate the effects of the Respondents' unfair labor practices.

In *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979), and *Haddon House Food Products, Inc. and Flavor Delight, Inc.*, 242 NLRB No. 180 (1979), Chairman Fanning and I set forth our reasons why a bargaining order should not be denied solely because majority support has not been demonstrated with certainty. There is no need to repeat the same arguments here. We stated that we would grant the bargaining order where the record clearly establishes that the employer has been guilty of most serious unfair labor practices which not only prevented the holding of a fair election but which also may have prevented the union from achieving majority status. There is little doubt that this is such a case.

In *Haddon House, supra,* we stated that the majority's failure to grant a bargaining order ". . . serves only to reward this Respondent for its serious and extensive flouting of the Act, to encourage others to engage in similar pervasive and egregious unfair labor practices, and, thus ultimately to undermine and frustrate the policies and purposes of the Act." Regrettably, that presage was accurate.

Dated, Washington, D.C. August 25, 1980

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Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

WE WILL NOT discriminatorily select employees for layoff out of seniority because of their union activities or support for the Union.

WE WILL NOT discriminatorily hire new employees for jobs at Summit, while former employees of Sumco are still laid off, in an attempt to displace employees who support the Union.

WE WILL NOT belatedly offer laid-off Sumco employees an opportunity to be considered for employment with Summit as probationary new employees without their old wages and fringe benefits because of their union activities or support for the Union.

WE WILL NOT interrogate employees about their union activities or support for the Union; threaten to discharge or lay off employees because of their union activities or support for the Union; threaten to close the plant if the Union becomes the employees' bargaining representative; state that the reason for layoffs is to get rid of union organizers; state that laid-off employees who support the Union will not be recalled; create the impression that employees' union activities are under surveillance; promise employees raises to deter them from supporting the Union; enforce plant rules more stringently in retaliation against employees' union activities; or threaten to take away employees' breaks in retaliation against their union activities.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make valid offers of reinstatement to Sheila Smith, Betty Hoover, Linda Booth, Dale Carder, Phyliss Young, Bonnie Thomas, Jayne Freiman, Beverly Claar, Diane Fridley, Ruth Duncan, Sandra England, Agnes Tanner, Connie Votaw, Mary Adamson, John Mesko, and Sheryl Legg, and make them whole for any loss of earnings they incurred as a result of their unlawful selection for layoff, or our unlawful refusal to recall them, or our invalid offers of reinstatement, with interest, less any interim earnings. In the event any of said employees have been reemployed, the remedy as to them will be modified accordingly.

SUMCO MANUFACTURING CO. INC.
SUMMIT GRINDING CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebreeze Federal Building, 1240 East Ninth Street, Room 1695, Cleveland, Ohio 44199, Telephone 216....522....3126.

Case 8-CA-11702

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUMCO MANUFACTURING CO., INC.,
SUMMIT GRINDING COMPANY

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

DECISION

Statement of the Case

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in Akron, Ohio, on January 23-26, 1979. The complaint alleged that Respondents: discriminated against some 25 employees by laying off or terminating them on January 4, 1978; discriminatorily terminated another employee; interrogated and threatened employees; and lastly, refused to bargain upon request, in violation of Sections 8(a)(1), (3) and (5) of the Act.

Counsel for the General Counsel, the Charging Party, and Counsel for the Respondent, all filed briefs which have been duly considered. On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Sumco, an Ohio corporation, located at 3985 Mogadore Road, Mogadore, Ohio, was engaged in

the manufacture of automobile jacks. In the preceding calendar year 1977, Sumco shipped goods in excess of $50,000 from its Ohio facilities directly to points located outside the State of Ohio.

Respondent Summit, an Ohio corporation, is located at 3991 Mogadore Road, Mogadore, Ohio, and is essentially a screw machine shop. It also makes jack stands and parts and automobile ramps. In the calendar year 1977, Summit shipped goods from its Ohio facility valued in excess of $50,000 directly to points located outside the State of Ohio.

The complaint alleges, and I find that both Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

An issue to be resolved is whether Respondent Summit is to be deemed a single or joint employer with Sumco, or an alter ego of Sumco.

The complaint alleges, the Respondents admit, and I find that the United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

Sumco and Summit existed as separate corporations occupying adjacent quarters in the same building. Prior to the incidents herein, Sumco primarily manufactured scizzor jacks and jack stands and procured some component parts for the jacks from Summit. Sumco manufactured, assembled and shipped these items to customers. Approximately one half of its orders it shipped went to customers of Summit, and the remainder being direct customers of Sumco. Summit was essentially a machine shop operation

and in the process it made component parts for jacks for Sumco. It also made auto ramps and other machine shop items. A more detailed discussitn of their operations occurs later herein.

I credit the testimony of Sumco employees Sheila Smith, Mary Adamson, and Denise Coontz, that beginning in November, 1977, and thereafter, they visited with a union representative, attended union meetings, distributed union literature and actively solicited their fellow employees to sign union authorization cards. The Respondent conceded they became aware of employees union activities beginning sometime in November, 1977.

During the holidays, beginning with Christmas, 1977, Sumco, as was customary in past years, closed for inventory. On January 3, 1978, certain employees returning to work wore union T-shirts and union buttons, and pieces of literature urging support for the union were circulated and posted around the plant. On the afternoon of January 4, 1978, Respondent Sumco, primarily through general foreman Bill Desatnik, notified some 27 employees that they were temporarily laid off and that they hoped to recall them within two to four weeks when business improved. A lack of orders or a slowdown in business was given to most employees as a reason for the layoff.

On February 22, 1978, pursuant to posted notice, the remaining employees of Sumco were informed that operations of Sumco were being taken over by Summit effective February 27, 1978. Sumco's manufacturing, assembly and maintenance operations were transferred to Summit and Sumco was restructured and became essentially a sales organization. The employees of Sumco at the time of the takeover were transferred to the payroll of Summit and continued to receive the same wages and benefits they had enjoyed at Sumco.

On January 6, 1978, the Union filed a representation petition seeking an election in a production and maintenance unit at Sumco. A hearing was held on January 23, 1978, and on February 3, 1978, the Regional Director for Region 8, dismissed the petition finding that a unit limited to Sumco alone was inappropriate and inferentially finding that a unit including employees of both Sumco and Summit appeared appropriate.

On February 10, 1978, the Union filed charges against both Sumco and Summit alleging violations of Section 8(a)(1) and (3) which was served on Respondents on February 13, 1978. On March 8, 1978, the Union submitted amended charges alleging a refusal to bargain which charges were served on the Respondents on March 10, 1978. By letter dated February 24, 1978, the Union had requested recognition and bargaining on behalf of employees of Sumco and Summit. The Respondents concede they received such a request and apparently responded, denying the request for recognition. At the hearing herein, the representative of Respondents conceded that they refused recognition because as a matter of policy they would not recognize a union absent an election and certification by the Board. The date the Respondents initially refused to bargain is not indicated in the record.

B. *Contentions of the Parties*

Counsel for the General Counsel contends that the Respondents constitute a single or joint employer, or alternatively that Summit is an alter ego of Sumco. The General Counsel further contends that 15 named employees were discriminatorily terminated or laid off on January 4, 1978, because of their union activities or support; that Respondents hired new employees without recalling employees on layoff; and, that conduct of Respondents' agents

and supervisors in interrogating and threatening to discharge employees or stating the plant would be moved or closed because of the union or their union activities, makes a fair election impossible and requests that a bargaining order be issued, as the Union represented a majority.

Counsel for the Charging Party asserts views similar to that of the General Counsel. He does specifically assert that there are 112 employees in the appropriate bargaining unit and contends that 64 signed union authorization cards constitutes a majority of the bargaining unit. He also, requests a *Gissel* bargaining order because of Respondents' alleged unfair labor practices.

Respondents' representative asserts the Respondents are separate corporations; that neither Donna Bolock nor Dominic Romeo, who allegedly threatened or coerced employees, are supervisors; that the layoff of January 4, 1978, was economically motivated and was in accord with seniority; that offers of employment have been made by Summit to all former employees of Sumco since the takeover of Sumco by Summit on or about February 27, 1978. He also asserts that certain individuals whom the Union seeks to exclude from the unit are not supervisors but employees.

C. *Issues*

1. Whether Sumco and Summit are deemed a single or joint employer, or alternately, whether Summit is an *alter ego* of Sumco.

2. Whether Donna Bolock and Dominic Romeo were supervisors.

3. Whether supervisors William Desatnik and Elmer Hamrick and alleged supervisors Bolock and Romeo en-

gaged in interrogation and threats and other conduct violative of Section 8(a)(1) of the Act.

4. Whether the discharge of Denise Coontz on or about December 19, 1977, was discriminatorily motivated.

5. Whether the layoff of 15 employees on January 4, 1978 and subsequent recall efforts were discriminatorily motivated.

6. Whether the Union represented a majority of employees in an appropriate unit when it requested recognition and bargaining on February 24, 1978.

7. If the Union is found to have a majority, was the conduct of Respondents so egregarious as to preclude a fair election and warrant the issuance of a bargaining order.

D. *Resolution of Issues*

1. Whether Summit and Sumco are deemed to be a singler employer or joint employer, or whether Summit is an *alter ego* of Sumco.

Respondents conducted their operations in the same building, which was personally owned by Harry Foley and his wife. Each Company has a separate address and separate entrances. The corporations (at least prior to February 27, 1978) kept separate payrolls, separate purchasing and sales and advertised separately. The banking and insurance policies for each corporation are separately maintained in separate offices by each of the corporations.

As to elements in common, both corporations have Harry Foley as president and chairman of the Board, a common secretary in Harry Schwab and a common labor relations consultant in Harvey Rector. Foley was president of Summit since its inception in 1945, owns 100% of the

common stock, representing 85% of the outstanding stock. Foley became president of Sumco sometime in 1977 when he owned 60% of Sumco's stock and he currently owns more than 60% of the stock. Foley exercised authority over managerial employees at both Summit and Sumco although day to day operations were handled by the respective managerial employees. He exercises final authority over wages and fringe benefits at both Companies and has set the financial policy for both Companies since 1976.

There is evidence that Respondents had integrated operations. For example, a joint maintenance service was provided for both Companies and Sumco toolroom employees used grinders and other equipment in the Summit toolroom. Richard Griffin, a Sumco employees, went through a 4-year apprenticeship, was paid by Summit who in turn billed Sumco for his wages. When he completed his apprenticeship, he was placed on the Sumco payroll. Dominic Romeo worked on the second shift at Sumco from July 1977 to January 1978 but remained on the Summit payroll. Sumco completed the manufacture and packaging of the jacks, after getting component parts from Summit. Summit owned the Sumco product line and leased it to Sumco.

On February 22, 1978, a notice was posted for employees announcing that the operations of Sumco were being transferred, effective February 27, 1977, to Summit and that current employees of Sumco were being transferred with the same benefits and wages. The effect of the transfer was that approximately 23 production employees of Sumco were transferred to Summit. The Sumco equipment was not relocated but was leased by Summit and additional equipment of Summit's was moved into the so-called jack division.

Foley testified that it was his decision to shut down the manufacturing operations of Sumco. Elmer Hamrick, vice-president and plant superintendent of Sumco became superintendent of the jack division at Summit. William Desatnik, general foreman of Sumco, became general foreman of the jack division at Summit. Since the shifting of manufacturing operations to Summit, Sumco has acted as a sales agency and approximately a third of its sales are on behalf of Summit.

In determining whether Summit and Sumco constitute a single employer or joint employers, the critical criteria considered by the Board includes: common ownership or financial control; integration of operations; common management; and, centralized control of labor relations.[1] From the above undisputed facts, there appears little doubt that Harry Foley had a majority ownership of both corporations and according to Foley, set the financial policy for each Company since 1976. I find a common ownership and financial control for both corporations.

As to integration of operations, Sumco completed the manufacture of jacks commenced by Summit, and in effect, the completed product was the result of the work output by employees of both corporations. As a result of the hearing held in the representation case, 8-RC-11196, and the record developed therein, the Regional Director made certain factual findings which are relevant here. He concluded that Sumco and Summit had a high degree of functional integration noting that: they operate in contiguous facilities in the same building; that Sumco uses Summit's shipping dock and tool and die room; that Summit owns and leases the equipment which constitutes Sum-

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1. See *International Union of Operating Engineers, Local 428*, 169 NLRB 184; *Gray-Grimes Tool Company, Inc.*, 221 NLRB 736, at 737.

co's production line; that they share the same maintenance employees; that Sumco purchases the component parts for its scizzor jacks from Summit and that they jointly produce ramps and jackstands; that approximately one-half of Sumco's production is sold and distributed through Summit. There is nothing in my record to contradict the factual findings of the Regional Director with which I am in accord. Thus, I conclude that there is a high degree of functional integration of operations between Summit and Sumco.

Centralized control of labor relations. It is not disputed that Foley approved wages and benefits at both corporations and that Harvey Rector, a labor relations consultant, was in fact consulted by Foley as to labor relations matters. It does appear that day-to-day operations, namely the supervision of employees and the routine matters that arose during the workday was largely handled by the respective managerial employees of both corporations. Inasmuch as the ultimate control of wages and benefits rested with Harry Foley, and he utilized the same labor consultant with respect to both corporations, I am satisfied that there was centralized control over the important aspects of labor relations and so find.

As to common management, the only evidence is the ultimate authority which rested with Harry Foley. As he testified, it was he who decided to transfer Sumco's manufacturing operations to Summit. It appears that as to policy matters in the management area, it was Foley who exercised ultimate authority. Again, as to routine management matters the respective managerial employees of both corporations had operational authority. In effect there was only partial common management existing at the top. In normal operations, prior to the demise of the manufacturing element in Sumco on February 24, 1978,

the respective corporations operated semi-independently. Subsequent to February 27, 1978, Sumco was essentially taken over by Summit.

I find that there was common ownership and financial control, integration of operations, and centralized control of labor relations, and a partial degree of common management during the critical period beginning in November, 1977, so as to warrant the conclusion that Summit and Sumo constitute a single employer.[2]

2. Whether Donna Bolock and Dominic Romeo were supervisors within the meaning of the Act.

Donna Bolock, an employee since 1968, was employed in the shipping division of Sumco, earned approximately $3.30 an hour, and exercised some authority over some four to six employees. Respondents' witnesses, general foreman William Desatnik, and Robert White, general manager, testified that Bolock did not possess any supervisory authority although White indicated that in addition to performing the same duties as other employees, she engaged in routine record keeping. These consisted of orders or information regarding daily production but did not include specific orders on assignment of employees to certain tasks within the shipping department. Desatnik testified that Bolock received orders from him and from Elmer Hamrick, shop superintendent, and vice-president of Sumco, with respect to what type of jack will be hung or packed and that Bolock is engaged in production work 95% of the time.

Donna Bolock did not testify.

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2. *Gray-Grimes Tool Company, Inc., supra;* see also *Suburban Transit Corp.*, 203 NLRB 465. In view of my conclusion, I find it unnecessary to consider whether Summit was an *alter ego* of Sumco.

Sandra England credibly testified that when she was hired in 1975 and began working in the shipping department, Donna Bolock told her that she (Bolock) was her boss and if she had any problems to come to her. She further testified that Bolock assigned her work, and evaluated her work once a month as to attitude, attendance, and quantity and quality of work. Desatnik conceded that he received reports from Bolock on the people in the shipping department but stated that he also checked with other employees. The pre-hearing affidavit of Donna Bolock, dated March 20, 1978, was read in part to Desatnik as follows:

> "After I gave the evaluations to Bill [Desatnik], he would read it in my presence and ask me to make changes or he would make changes. The basic subjects I covered were quality, quantity, attendance and attitude. He basically had the records regarding the attendance and attitude, but he usually had no other way of knowing of girls' quantity or quality. Basically, even though he always read my evaluations, he usually took my evaluation as is in all four categories." (Tr. p. 652)

When asked whether the above statement was corrent Desatnik responded "No, not in its entirety." No further explanation was asked or given.

Dale Carder, an employee of Sumco from approximately September 1976 until February 1977, credibly testified that he acted as a stockboy for Donna Bolock and that occasionally Bolock would come over and get him to get some stock for her. When asked if he was ever told that Mrs. Bolock was a supervisor, Carder responded that he was told "that she was like packaging foreman. She would tell them—she gave the orders to all the girls in the packaging line there."

Sheila Smith credibly testified that she believed Bolock was a supervisor because she disciplined people, specifically, that she was yelling at Diane England that if she missed any more [work], she was out. She further testified that Bolock took her off her job when they were short in shipping and that Bill Desatnik introduced Bolock as one of her bosses and told her if she had problems to go see her.

John Mesko, a former employee of Sumco, credibly testified that he worked for Sumco from April 1977 to January 1978 and for part of this time he was a stockboy. He was later transferred to the shipping department and Desatnik introduced him to Donna Bolock as his supervisor and stated he was to listen to her because she was the boss. He further testified that he got permission from Bolock to leave work early and that on one occasion she reprimanded him for talking to an employee in the handle room. He also stated that she evaluated him every month.

The record establishes to my satisfaction that Bolock, did not hire, fire, promote or effectively recommend such actions. It is well settled that an individual need have or exercise only one attribute of a supervisor.[3] If she is a supervisor, it would have to be primarily on the basis of her assigning employees work and utilizing independent judgment in the process. She received her production orders daily either from Hamrick or Desatnik as to the numbers and types of jacks to be packaged and shipped and she utilized a work force of six employees and a stockboy to accomplish that purpose. I further conclude that she was represented to employees as a "boss" or packaging foreman, that she did written evaluations on the employees in the shipping department, granted

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3. *Research Designing Service, Inc.*, 141 NLRB 211, 213; *Ohio Power Company v. N.L.R.B.*, 176 F.2d 385, 387 (C.A. 6).

employees time off, did have the authority to impose minor discipline of employees for poor work or absenteeism without necessarily having the right to discharge or effectively recommend their discharge. I further find that although she was given the production orders to be shipped, she normally determined what person to assign to which job. I find that such job assignments required independent judgment based on her knowledge of the abilities of the persons involved. On such basis, I conclude she is a supervisor within the meaning of the Act.[4]

Dominic Romeo. Again White and Desatnik testified unequivocally that Romeo did not have the authority to hire, fire, promote, etc., but merely handed out the work in accordance with the instructions of Desatnik or Hamrick.

As with Bolock, the issue here is whether Romeo is merely a leadman or whether he was a supervisor. In his prehearing affidavit, dated March 28, 1978, and presented to him at the hearing, Desatnik stated that Romeo was a salaried employee, a second shift foreman over some 12 employees. Desatnik further noted:

> From sometime in August 1977 until the end of December 1977, he was second shift foreman for Sumco. Except for the period when first and second shift overlapped, there was no other foreman or supervisor at the plant but Romeo on second shift. He was in charge of the plant on second shift.

In his testimony at the hearing, Desatnik stated that Romeo had none of the attributes of a supervisor, that

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4. See Respondent's Exhibit 1, p. 41, where Robert White, general manager of Sumco, stated Bolock could transfer employees from one job to another in her area. If Bolock is not a supervisor, Respondent has only 4 supervisors over 50 employees with the lowest ranking supervisor in the jack division with approximately 40 employees, being Desatnik, the general foreman.

he merely followed the orders he laid out for him. Further, if something arose later, Romeo called either Desatnik or Hamrick for advice or instructions. I find his affidavit inconsistent with his later testimony and for reasons detailed elsewhere, I cannot credit his testimony.

In addition I credit the testimony of employees Thomas, Claar, Tanner, Hoover, Booth, Young and Frieman that Romeo was their supervisor. Tanner testified that Hamrick told employees when Romeo was first assigned there, that Romeo was night shift foreman and supervisor and employees could take their problems to him. Also according to Hoover, Romeo would tell them what job to perform and if an employee ran out of parts or if the machine broke down, Romeo would transfer the employee to another job. Frieman also testified that she waited each day for Romeo to assign her a job. Romeo wore a little white coat, did not engage in production work and when he wasn't observing the work of other employees he sat at a desk located in the plant. He also initialed timecards and evaluated employees' work.

Romeo did not testify.

In light of the fact that Romeo was the only foreman on the second shift, which had some 12 employees, the credited testimony that he assigned employees to jobs, and his description as a night foreman by both Hamrick and Desatnik, I find and conclude that Dominic Romeo is a supervisor within the meaning of the Act.[5]

3. Whether supervisors Bolock, Romeo, Desatnik and Hamrick engaged in interrogation and/or threats violative of Section 8(a)(1).

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5. *Photo Plastics Corp.*, 127 NLRB 1511, 1513; *Research Designing Service, Inc., supra.* I further note that at the representation hearing Respondent stipulated that Romeo was a supervisor. Resp. Ex. No. 1, p. 104.

(a) Donna Bolock. As noted previously Bolock did not testify. Consequently, the testimony of many employees as to Bolock's conduct is uncontroverted.

Allegations: unlawful interrogation and creating the impression of surveillance; unlawful interrogation and promise of a raise; unlawful threat of plant closure; unlawful threat of discharge because of signing a union card (Paragraph 7(A) - (D) complaint).

John Mesko credibly testified that Donna Bolock, sometime in December 1977, asked him if he had signed a union card and he told her no. She approached him subsequently, and informed him that she had seen his card and he then admitted signing a union card. In further conversations Mesko had with Bolock she asked him why he wanted the Union and when he responded for better wages she said she would go to Elmer (Hamrick) and try to get him a raise. Bolock also called him a traitor for signing a card and told him if the Union ever got in, Foley would close down the plant and move South. She also told him that because he signed a card, he probably wouldn't have his job much longer. In these same conversations, according to Mesko, Bolock would "try to guess who were the union organizers, if it was Sheila [Smith] or Mary [Adamson] or something like that but I never answered."

Mesko is presently employed at Lee Lumber Co. I find his uncontroverted testimony credible. Accordingly, I find the allegations proved and find each allegation (Paragraph 7(A) - (D)) violative of Section 8(a)(1).

Additional allegations against Bolock include: telling employees to keep their nose out of the Union if they wanted their jobs (Paragraph 8, complaint); unlawful interrogation (Paragraph 9); threats to discharge employee

if she got union literature (Paragraph 10); telling employees to bring in any (Union) mail within three days and turn it in to her or lose their jobs (Paragraph 11).

Sandra England credibly testified that around December 4, 1977, Donna (Bolock) asked her if she knew about the Union and when England responded no, Bolock stated that if you girls want to keep your jobs, keep your noses clean and keep out of it. Bolock also asked her where her card was and told England to bring it in and she would take it into the office. England further testified that after her layoff on January 4, 1978, she continued to visit the plant to have lunch with her mother who also worked there. During such visits, Bolock asked her if she went to union meetings and what her opinion was about what other people had said at the meetings and what went on.

Sheila Smith credibly testified that she heard Bolock tell one of the girls that if she, Bolock, received any trash from the Union, she would see to it that she lost her job. She further testified that after they started mailing out letters and (union) cards in the mail, Bolock told employees that they had three days to turn it in to her or they would lose their job. Smith stated Bolock made this statement to, *inter alia,* employees Mesko, Peggy Buckley, Sandy Summers (England), all of whom worked in the shipping area.

In light of the credited and uncontroverted testimony noted above, I find that Donna Bolock did unlawfully interrogate employees, promised an employee a raise, threatened employees with discharge if they did not keep their noses clean and keep out of Union, or if they did not bring to her union material received in the mail. Each of the above allegations is supported by credited testimony and each is violative of Section 8(a)(1).

(b) Allegations involving Dominic Romeo. Romeo did not testify and the testimony of employees is uncontroverted. The allegations involve threats of loss of employment and plant closure.

Agnes Tanner's uncontroverted and credited testimony is that on the night of the layoff she heard Dominic (Romeo) telling Betty Hoover that "anybody that had union buttons on or supported the Union would not be called back to work." Linda Booth testified similarly that she overheard the conversation between Romeo and Hoover, wherein Romeo said something about any girls wearning union buttons or stickers would not return to work and that Harry Foley (the owner) would shut down and reopen under another name and we wouldn't have our jobs any longer. Hoover testified credibly to the same effect and added that Romeo put his arms around her and said "If you repeat any of this, I will deny it to my dying day." The testimony is uncontroverted and credited that Romeo threatened that employees supporting the Union would not be called back and that Foley would close the plant or reopen under another name. I find these comments violative of Section 8(a)(1) of the Act.

(c) William Desatnik. He is the general foreman, originally of Sumco and more recently of Summit, and an admitted supervisor. He allegedly interrogated employees in December 1977, restrained and coerced employees on or about January 3, 1978 by informing them that certain employees were being laid off because of their union activity, and discriminatorily enforced work rules in reprisal for employees' union activities.

John Mesko credibly testified that sometime in December 1977, Bill Desatnik asked him if he had gotten any union mail and he didn't respond. Sandra England

credibly testified that on or about December 16, 1977, she was called to Desatnik's desk and asked by him if she had been confronted by anyone running the union campaign, and named employee Mary Adamson. When she replied no, he asked her opinion about the Union and how her mother would feel. Although Desatnik testified, he did not deny such conversations. I find the interrogation of Mesko[6] and England violative of Section 8(a)(1) of the Act.

Sheila Smith credibly testified that there was a change in management's conduct after union literature surfaced at the plant. Specifically, she stated that before they got involved in this (union activity), the rules were pretty lenient at Sumco. Afterwards, she had difficulty getting drills changed on her drill press, her breaks were timed, and her machine was not stocked. She testified credibly that on one occassion Desatnik kicked the bathroom door open and said "Smith, get back to work." At that time there were four others in the bathroom who were also on their break.

Sandra England testified that on the day of the layoff, Desatnik notified her, and stated you know the reason, "we are trying to get rid of the people that are trying to organize the Union for this Company," Desatnik denied asking this statement. I credit England over Desatnik. Desatnik had a penchant for overstatement, his prehearing affidavit was in part inconsistent with his testimony at the hearing, he contradicted himself in several instances, did not dispute testimony involving certain Section 8(a)(1) allegations, and appeared to tailor his testimony as best

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6. While the interrogation of Mesko standing alone might be deemed innocuous, when considered with the testimony of England and Smith, it warrants a finding of a violation.

he could without being too accurate or too factual.[7] For all of these reasons I concluded that Desatnik's testimony is not credible whenever there was a critical conflict with that of other witnesses in this hearing.

I find that Desatnik did unlawfully interrogate Mesko and England about the Union, and engaged in restraint and coercion of employees by advising England that the layoff was to get rid of people organizing for the Union; further that he discriminatorily enforced plant rules against Smith, all in violation of Section 8(a)(1) of the Act.

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7. As to overstatement, for example, when Desatnik was asked if certain authority was taken away from him because of the union activities and orders from Foley and Rector, he responded: A. Was totally taken away from me. At that point, I could not function as a foreman anymore, and at that point I advised Mr. Jones that I would stay on a little while longer with the Company until this mess was over, and at that time, I was getting another job because a foreman cannot function under these conditions. There is no way." (Transcript p. 594)

His prehearing statement, which was read to him at the hearing, identified Dominic Romeo as a salaried employee, the foreman on the second shift over some 12 employees and as the person in charge of the plant after top management left. In his testimony, he stated unequivocally that Romeo had none of the attributes of a supervisor.

As to contradictions, he testified that no one was discharged once union activities began. He later conceded that Denise Coontz was discharged on December 19, 1977. At another point he stated there were no plant rules. After being confronted with a copy of a plant rules, he admitted that it was posted on the bulletin board but that he did not follow it in most instances.

At page 598 of the transcript, he stated he mistrusted Romeo stating: "I will be honest with you. I heard that he attended union meetings. Right then and there that tells me something is wrong." This does not appear to be the type of comment someone would make on the activities of an employee. In any event it establishes Desatnik's continuing interest in union activities at the plant.

Desatnik's testimony did not dispute certain testimony of Mesko and England as to his interrogation about their union sympathies or activities.

(d) Allegations involving Elmer Hamrick, vice-president of Sumco and shop superintendent of Summit. Hamrick is alleged to have threatened to take away the employees' coffee break in reprisal for employees' union activities.

Mary Adamson testified that on or about December 1, 1977, she, Roberta Stull, Peggy Chaney, and Deborah Fridley left work ten minutes early to go wash up and were called into the office by Bill Desatnik. Desatnik told them there were going to be big changes, that they knew they were not supposed to wash up before a break. According to Adamson, they never said that to them before. She also stated that Hamrick said there were going to be changes and threatened to take away their breaks because they knew they were not supposed to leave early to wash up. She further testified that she had washed up early prior to that without being called into the office.

Mr. Hamrick denied threatening to take away any coffee breaks in reprisal for their union activities and further denied threatening to take a coffee break away from any individual.

As a general rule, if an employer becomes more strict with employees after union organizing begins, it is deemed to be a reprisal for such union activities and is violative of the Act.

I conclude the incident did occur and credit Adamson in this regard. While I would ordinarily be reluctant to hold that an employer cannot require employees to work on working time, here it has been established that prior to the advent of the Union, employees were permitted to leave work prior to their break without being reprimanded. Accordingly, I find that the threat to take away their breaks if employees didn't cease leaving early for their breaks,

while justifiable in ordinary circumstances, was in retaliation for their union activities and was violative of Section 8(a)(1) of the Act.

4. The alleged discriminatory discharge of Denise Coontz.

It is undisputed that on or about December 19, 1977, Denise Coontz was called into the office of Elmer Hamrick by Bill Desatnik and informed that she was discharged because of absenteeism. It is also undisputed and Coontz readily admitted that her attendance at work was not good.

According to Coontz whom I credit in this regard, she was one of the principal union organizers in the shop. She had been an employee from May of 1976 until her discharge in December 1977. She stated that she and Mary Adamson went down to the Akron (Union) hall and talked to Joe Jacobs, a union representative, about getting a union started. She passed out union authorization cards to employees and talked to other employees about the Union in the plant bathroom where employees ate lunch and that this occurred in November and December 1977. She admitted having an attendance problem from the time she started working there and was warned "lots of time," about 10 or 11 times, about it. She admitted receiving a written warning about her attendance but stated she received no written warning the week of her discharge and did not recall whether she was absent or received any verbal warnings that week. On the day of her discharge, Desatnik called her into Hamrick's office, and told her she was missing too many days and they had to fire her.

Factors tending to support a finding of discriminatory termination include: the timing of her discharge approximately a month after union activities became known to Re-

spondent; the fact that although her attendance had been poor since she began work, it was tolerated; lastly, she was active on behalf of the Union and was one of the original organizers.

In defense of her discharge, it should be noted that she acknowledged that she was warned 10 or 11 times, and that she had received a written warning. The written warning, received in evidence as General Counsel's Exhibit 10 was dated October 18, 1977, addressed to Denise Coontz and stated:

> As you know Elmer Hamrick and myself talked to you in September about your absentee record. At that time you assured us it would be improved. As you know it has not improved. This will be your last warning.
>
> If it does not improve considerably, you will be dismissed immediately.

The written warning was signed by Desatnik and Hamrick, and also by Coontz, apparently as an acknowledgement of the warning.

The issue, simply posed, is whether Coontz was discharged for her union activities or for her absenteeism. In view of her admittedly poor attendance record and the fact that her final warning on absenteeism was dated October 18, 1977, prior to any alleged union activity, I am not persuaded that her discharge was discriminatorily motivated. Just because an employee engages in union activities does not insulate her from discharge if good cause exists. I find and conclude that her discharge was in fact caused by her poor attendance and not her union activities and I recommend dismissal of the allegation that it was violative of the Act.

5. Whether the layoff of 15 employees on or about January 4, 1978, or subsequent attempts to recall was discriminatorily motivated.[8]

The essence of this allegation is three-fold: whether the layoffs were based on valid economic grounds or were discriminatorily motivated; secondly, even assuming the initial layoff was lawful in terms of cause, was the selection of certain employees for layoff out of seniority discriminatorily motivated; lastly, whether the method of recall constituted a valid offer of employment particularly where Respondents hired new employees while old employees were on layoff.

In determining these issues, the record and briefs of the parties discloses many factors, some of which are supportive of a finding of a discriminatory intent, while others appear supportive of contentions that valid economic reasons prompted the layoffs and recalls. These various factors will be discussed at length hereafter.

(a) Was the layoff of 15 employees discriminatorily motivated.

Timing of the layoffs. Previously noted facts, including admissions by Respondent's officials and counsel, established that Respondent became aware in November, 1977, that union organizational activity was taking place at the Sumco plant. Organizational activity increased in December and included the circulation of literature and union strikers and on January 3-4, 1978, at least a half dozen

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8. The complaint alleged that 26 employees, including Denise Coontz, were discriminatorily laid off and not reinstated. Counsel for the General Counsel now urges in her brief that 15 named employees were discriminatorily laid off and at the hearing amended the complaint to delete the name Coontz from paragraph 19 of the complaint as Coontz was alleged a discriminatory discharge or layoff in paragraph 18 of the complaint. The change of position and the impact of a selective layoff are discussed more fully hereafter.

employees wore union T-shirts or union buttons at work. The layoff announced and implemented on January 4, 1978, was without warning although previously when layoffs occurred, notices were posted in advance.

Connie Votaw credibly testified that she took off work in September, 1977, to have a baby and when she called Elmer Hamrick shortly before Christmas and asked him if she could return to work, he told her to come back to work on January 3, 1978, that there was plenty of work.

Respondents contend that the layoff was prompted by a large inventory and slowdown in orders. Since the customary inventory was made during the holiday season, the amount of inventory on hand should have been known shortly before employees returned to work on January 3rd. While the timing of the layoff is arguably suspicious, standing alone it is not conclusive but must be considered in conjunction with other factors.

Layoffs and Seniority. While Respondent contends that seniority was followed in selecting those for layoff, the testimony of Robert White, general manager of Sumco, indicated there were a number of variations from seniority. He stated that three or four people were retained because of a specific job they were doing. Thereafter, he conceded that a number of employees, namely, Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, Betty Hoover, were laid off out of seniority because of either their absentee record, or limited availability such as being able to work only the second shift. The limited availability was attributed to employees Beverly Claar and Betty Hoover,[9] to the effect that they could only work

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9. At the representation hearing, Respondent stipulated that the only reason Hoover was laid off was seniority. Resp. Exh. No. 1, p. 92. Moreover, all six employees laid off out of seniority had signed union cards.

the second shift. However, Hoover credibly testified on rebuttal that while she had listed the second shift as preferred when initially employed, she was not offered work with respect to either first or second shift at the time of the January, 1978 layoff.

While the retention of 3 or 4 people out of seniority on the basis of their job skills is a legitimate reason and non-discriminatory, laying some six people out of seniority because of their absentee record or limited availability without heretofore relying on absenteeism or ascertaining their availability, establishes a substantial variation from seniority and raises substantial questions as to the real motivation in the selection of certain people for layoff.

Transfer of orders from Sears and Western Auto

There is a conflict in the testimony of Respondent's managerial employees as to whether orders from Sears and Western Auto were pulled back or transferred back from Sumco to Summit, resulting in whole or in part for the layoff of Sumco employees.

Robert White, general manager of Sumco, admitted, on cross-examination, in the representation hearing that the layoff was caused in part by Mr. Foley's taking away the two big orders (Sears and Western Auto) from Sumco and that the employees of Sumco were working on such orders in December of 1977 and January 1978 prior to the layoff.[10]

In the representation hearing held on January 23, 1978, Respondent sought to establish that Respondent Summit did lift the orders from Sumco because Sumco had in-

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10. Respondent's Exhibit No. 1, p. 50.

curred financial losses and in fact owed money to Summit. Since Foley owned and controlled both corporations, it is at the least, highly implausible that Sumco could or would not pay Summit for parts secured from Summit before paying their creditors.

Based on White's testimony which I credit, it is clear that the transfer, or lifting the Sears and Western Auto orders from Sumco was a contributing factor in causing the layoffs of January 4, 1978.[11] Still in issue, however, is whether the decision to lift such orders from Sumco was discriminatorily motivated. The record does not disclose that the jacks previously made by Sumco were subcontracted elsewhere or that Summit immediately began manufacturing its own jacks. It does disclose that two or three weeks after the layoff, Summit transferred approximately three to six employees to work in the jack division of Sumco, at least two of whom became permanent transfers.[12]

Sumco continued to operate its jack division with approximately half its normal work force until Foley decided on or about February 20, 1978, to have Sumco taken over by Summit which was done effective February 27, 1978. In effect Summit took over Sumco's production of jacks and reorganized Sumco, relegating only sales functions to Sumco. Again the key issue, namely—what motivated the change—valid economic reasons or the desire to rid itself of individuals supporting the union—must be reserved pending a careful examination of all pertinent factors.

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11. White indicated that orders for Sears and Western Auto constituted approximately one half of Sumco's business. This is borne out by the fact that 27 employees were laid off at Sumco while 23 remained at work and ultimately were transferred to Summit's payroll.

12. Frances Anderson and Sue James. Tr. p. 398, 417, 420.

Evidence of discriminatory motive for layoffs.

I have credited the uncontroverted testimony of employee Tanner that on the night of the layoff she heard Dominic Romeo telling Betty Hoover that anybody that had union buttons on or supported the union would not be called back to work. This was corroborated by the credited testimony of Hoover and Booth. Booth testified in addition that Romeo stated that Harry Foley, the owner, would shut down and reopen under another name and we wouldn't have our jobs any longer.

With respect to William Desatnik, the general foreman, I have credited Sandra England that Desatnik told her on the day of the layoff[13] that the reason for the layoff was to get rid of the people that are trying to organize the Union for this company.

While the testimony as to Romeo's comments on the layoff might arguably be the personal comments of a low level supervisor, when a similar view is expressed by the general foreman, I am persuaded that the views expressed reflected a discriminatory motivation in the selection for layoff.

Wage increases. A 9.2% wage increase notice was posted during the holiday shutdown (December 25—January 3, 1978) which apparently became effective in early January, 1978. The General Counsel argues that the layoff of selected employees who either favored or were active on behalf of the Union was coupled with an increase for the employees who remained, was an incentive to reject

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13. I note the union authorization card was signed by England on January 4, 1978, and that Janice Hiner, an original supporter of the union, attended union meetings when cards were signed in Nov.-Dec., 1977 and was dating Desatnik, the general foreman. Tr. 94, 260. In sum Desatnik may have believed England was not a union supporter when he made that remark.

the Union. I credit undisputed testimony that the Company gave an annual wage increase every year at the beginning of the year. I conclude that the granting of increases in such circumstances is *not* a factor in determining whether the layoffs or failure to recall were discriminatorily motivated.

Hiring of new employees at Summit prior to recall of Sumco employees.

A number of employees credibly testified that when the layoff occurred they were told it was temporary and they would be recalled within two weeks to a month. Subsequently, the layoff became permanent and on or about February 20, 1978, Foley testified he decided to cease the production, assembly and maintenance operations at Sumco.

The record reveals (Charging Party Exh. 5, 6)[14] that five new employees were hired by Summit between January 13 and February 15. Further, there were 13 new employees hired by Summit between February 27 and March 30, 1978. While both Jones and Hamrick testified that they were instructed to hire Sumco employees back before hiring new employees, such instructions were not strictly followed. Hamrick admitted that as of March 28, 1978, 6 former employees of Sumco had been recalled to work by Summit, as contrasted to 18 new employees hired by Summit between January 13 and March 30, 1978. Upon being recalled, Jones testified that: Jesse Bibby was hired as a stockboy in the jack division; Trena Eldridge was hired for the jack division (1st shift); Patricia Gaines was hired for the 1st shift in the jack division; Rhonda Russell was hired for the first shift in the jack

14. See also Tr. p. 542-546.

division; Nancy Reeves was hired first shift in the machine division; Narda Sullivan, Bernard Parsons and Vicki Johnson were hired for the first shift. In explaining why new employees were hired in the jack division, Jones testified:

> . . . it was my responsibility to get the laid off employees at Sumco Manufacturing back to work as soon as possible without destroying the production we already have, which we didn't have very much of. As I stated in previous testimony, we were experimenting, trying to time study, and quite frankly, *I did want to try some new people.*
>
> So, as I say, if there was a discrepancy of not calling back some Sumco people, it was strictly on my shoulders. (Emphasis added, Tr. p. 725)

Further on in the record, Jones was asked if former Sumco employees could not have done the work, and he responded indirectly by stating:

> I was experimenting. I figured I could use no former employees that were set in their ways when I wanted to try something new. We knew we were going to call these people back. I wanted to possibly change the set-ups and the procedures and have it down pat by the time we actually got back into production. (Tr. p. 727)

Jones conceded that Russell, Gaines, Sullivan, Johnson and Parsons were newly hired in February, 1978, before the final callback of the Sumco employees. He explained in part however, that Rhonda Russell had quite a few years of experience at General Electric.

Again at p. 730, in explaining why new employees were hired prior to recalling former Sumco employees, Jones stated:

> I would like to emphasize on my own behalf I was told to bring them back efficiently without hindering production in any way, shape or form. I was not told to bring them back indiscriminately.

On the basis of the previously recited facts, I find that Respondent Summit hired a number of new employees for the jack division while the former employees of Sumco who worked in the jack division were still on layoff and before they were informed that Summit was hiring and they should apply to Mr. Jones of Summit about a job.

Hamrick testified that he went down the layoff list and attempted to contact all 25 employees on layoff. While he did not recall when he made the calls, he estimated approximately three weeks after the layoff. If he failed to contact a person by phone after several attempts, he would turn the name over to Summit and they would send the person a letter. He did not know if or how soon thereafter, Summit sent letters to those people. If he did personally contact employees, he told them if they were interested in going back to work they should come down and see Mr. Jones about a job, that he was no longer doing the hiring. Respondents' Exhibits 5 through 9 are copies of letters dated either April 11 or 12, 1978, two of which confirmed that an offer of job at their old rate of pay had been made while three informed them of possible job opportunities.[15] The text of the latter letter stated:

> Please be advised that Summit Grinding & Machine Co. is still looking for good dependable employees.
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> If you are interested in a job at Summit, come into the office in person and make application.

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15. In view of the dates on Respondents' Exhibits 5-9 and the testimony of Ruth Duncan that she was telephoned and recalled in May, 1978, Hamrick's or Jones' recall attempts occurred from mid-February through May 1978.

When we have a job opening commensurate to your ability we will consider your application with, at least, the same rate you had at Sumco Manufacturing Co.

Very truly yours

The record established to my satisfaction that Summit did in fact hire new employees for the jack division while having former jack division employees at Sumco, on layoff. Further, in contrast to the employees who were not laid off by Sumco but were transferred to Summit and retained their wages and benefits, the laid off employees had *to make application* for a job and many were told that they would have to start as new employees, including probation without the fringe benefits they previously enjoyed at Sumco. As a result of the limited nature of employment offers several employees rejected employment offers.[16]

Factors supporting a valid economic layoff

Selective layoff. The Respondent laid off approximately 27 employees on January 4, 1978. While the complaint alleged 25 employees were discriminatorily laid off, Counsel for the General Counsel has contended in her brief that 15 of the individuals selected were for discriminatory reasons. I construe this position as an abandonment of any allegations with respect to 9 employees,[17] the

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16. Betty Hoover, Tr. 755; Mary Adamson, Tr. 159; Agnes Tanner, Tr. 187; John Mesko, Tr. 149.

17. In view of the General Counsel's position, page 1, her brief, and except for Sheryl Legg, there was no or little testimony adduced to support that portion of the complaint alleging that Carol McCleary, Vern Galloway, Michael Goodpasture, Lynda Gorman, Lyn Postlethwait, Robert Michaels, Peggy Chaney, Robert Hazelett, Denzil Linton, were discriminatorily laid off or

(Continued on following page)

balance of those laid off on that date. While employers have been known to cloak illegal layoffs by laying off other employees, the fact that 9 other employees were laid off adds some credibility to employer contentions of a valid economic layoff.

Foley testified credibly that Sumco had lost money the last six months of 1977, and that banks and other creditors wanted some reorganization or takeover of Sumco to assure that existing loans and indebtness of Sumco would be satisfied. He stated that Sumco's jack division was cut back on January 4, 1978 after a review of incoming orders and the amount of jack inventory on hand. It was sometime after the closedown and after several meetings with his attorney and bank representatives that he decided that Summit would take over the manufacture of jack operations and Sumco was relegated to the function of a sales organization. The decision to reorganize Sumco and for Summit to take over the task of manufacturing jacks was made on or about February 20 or 22, 1978, and a notice was posted on February 22 that effective February 27, 1978, all production, maintenance and assembly employees of Sumco were transferred to the payroll of Summit with their existing wages, and fringe benefits. The only exception was that if existing wage scales were higher in a particular operation, the former Sumco employee would receive the higher rate.

Filing of representation petition. The record discloses that a representation petition for an election in a production and maintenance unit *at Sumco* was filed on Jan-

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Footnote continued—

terminated, I shall dismiss such allegations, particularly in light of my findings that the layoff itself was for valid economic reasons. Sheryl Legg was selected for layoff out of seniority which I find was discriminatory in light of Respondent's established union animus.

uary 6, 1978, two days after the layoff was announced and implemented on January 4, 1978. There is no evidence to indicate that the Respondent or even pro-union employees were aware if or when the petition for election was to be filed even though Respondent had been aware of union organizing going on since November, 1977, and a number of employees circulated union literature and openly wore union buttons or union T-shirts.

Findings and Conclusions on Allegations of Discriminatory Layoff and Recall

For the reasons set further hereafter, I find that the initial layoff of employees on January 4, 1978, was for valid economic reasons. While I find the layoff was prompted by a large inventory and a slowdown in orders, I further find that the selection of certain employees for layoff was discriminatorily motivated and that Respondent's hiring of new employees for the jack division of Summit (which had been transferred from Sumco) before offering employment to former employees of Sumco, is further proof of a discriminatory motive.

In concluding that the layoff of January 4, 1978, was economically motivated, I credit testimony of Foley that Sumco had been losing money for six months prior to the layoff. Further, I credit the testimony of Wilfred Jones, general manager of Summit, that after the layoff at Sumco, no jacks were produced, and that ultimately he utilized some Summit employees and a new machine was ordered to update the jack line and thereafter only Summit produced jacks.[18]

In concluding that Respondent discriminatorily selected certain employees for such layoff, I note and rely

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18. See Tr. p. 547, 548, 551.

on the following factors: (1) despite claims of layoff by seniority, at least six employees were selected for layoff *out of seniority;* (2) the uncontroverted and credited testimony that supervisors Bolock engaged in extensive threats to employees and Romeo told union supporters they would not be called back; (3) the credited testimony that Desatnik stated that the layoff was prompted by employees' organizational efforts on behalf of the Union; (4) Respondent conceded that it hired new employees, including at least 4 to 6 employees for the jack division before offering former Sumco employees the opportunity to be employed; (5) the invalid offers to former Sumco employees in that they were merely offered the opportunity to be considered for employment, rather than offered employment. Further to the extent offers of employment were made, they were as new employees of Summit without their prior benefits and for a probationary period. As a consequence, several employees turned down offers of employment; (6) Summit hired 18 new employees and 6 former employees of Sumco, or a total of 24 employees by late March or early April, 1979, as contrasted to the 27 employees of Sumco laid off on January 4, 1979.[19]

All of the above factors convince me that Respondent utilized its temporary layoff to selectively rid itself of certain employees and then belatedly install a recall procedure which tended to discourage former employees from coming back to work. I find, therefore, that the six employees selected out of seniority were discriminatorily selected and should not have been laid off. I further find that the belated offers *to consider* former Sumco employees was an inadequate offer and discriminatorily motivated, designed

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19. While some of this hiring may have been caused by attrition, Wilfred Jones testified that he only hired one or two skilled people. Tr. p. 516. See also Tr. p. 542-546.

to discourage former employees from seeking employment with Summit as part of a continuing effect to create a turnover of employees and erode union support among the employees. Lastly, Respondents' (Summit) hiring of employees for the jack division and elsewhere while employees of Sumco were still on layoff, confirms my views that Respondents actions were discriminatorily denied employment when Summit hired new employees for the jack division and for other areas in which Sumco employees were qualified. The exact determination of which employees were entitled to be recalled and the dates will be determined in compliance proceedings as more fully detailed in the remedy section of this decision.

6. Whether the Union represented a majority on February 24, 1978.

The complaint alleges that the Union represented a majority of employees in the production and maintenance unit of Sumco and Summit since on or about February 24, 1978, and that Respondent has refused to bargain despite request. It is further contended that the unfair labor practices committed by the Respondent since December 1, 1977, have made a fair election impossible. As a remedy therefore, the General Counsel and Charging Party request that a bargaining order be issued.

A threshold question is whether the Union did in fact have an authorization card majority of employees in the appropriate unit at the time of the request for bargaining. If the Union did represent a majority, then the unfair labor practices found against the Respondent will be reviewed to determine whether such conduct precludes a fair election and warrants the issuance of a *Gissel* bargaining order.[20] Conversely, if it is found that the Union did *not*

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20. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969).

have a majority on or about February 24, 1978, further discussion about the applicability of a bargaining order is unnecessary.

(a) Did the Union represent a majority of employees in the appropriate unit?

In determining whether a majority exists, the total number of employees in the appropriate unit must be determined. Charging Party's Exhibits, identified as 5A and 5B, is a list of Sumco employees as of January 3, 1978, a day prior to the layoffs, and totals 55 in number. Charging Party's Exhibits 6A, B and C is a list of Summit employees as of February 22, 1978, and lists the names of 91 employees. Both lists were obtained from the Respondents. The parties differed as to whether certain individuals on the lists were properly includable in the unit and their status must still be resolved.

The General Counsel contends that the Union had approximately 64 signed cards at the time of the request for recognition in late February, 1978, and that as the parties stipulated to exclude Terry Cotten, Larry Gough, Donald Emerson, Philip Hendricks and Todd Pollack, they should not be included in the unit. She further contends that the parties agreed to delete Lynn Postlethwait from the list of employees and to add the names of Gary Buckbee and Mark Coontz to the list of employees (Exhibits 5 & 6); that Clement Knapp has no community of interest with the employees and should be excluded; that student employees Dziados, Pollack and Hendricks, who were students at local high schools and were employed under "outside work experience" or OWE programs, should be excluded because their employment tenure is brief, and the percentage of those remaining employed after graduation from school is significantly low. Finally, she urged that

Norman Forshey, who filled Romeo's job subsequently, be deemed supervisory and excluded from the unit.

Counsel for the Charging Party, in reviewing the employees list introduced herein as Charging Party's Exhibits 5 and 6, urges elimination from the Exhibit 5 list as supervisors, Elmer Hamrick, Ernest Kemppell, William Desatnik, Donna Eolack, and Frank Heisler. The Charging Party further notes that two names were added to Exhibit 5, totaling 50 names and then ten should be removed, leaving a total of 40 names on Exhibit 5 who are properly included in the unit.

As to Exhibit 6, Counsel for the Charging Party notes that it contains 91 names and contends that 19 of these should be eliminated. In addition to the contentions set forth by Counsel for the General Counsel which were joined by the Charging Party, the following additional eliminations from the unit lists are urged on the grounds that certain leadmen, named hereafter, earned as much or more than Dominic Romeo and should be held to be supervisors. These were listed as Raymond Roth, Lee Frame, Jr., Carl Lewis, John Mathia, Richard Seiter, Harold Queer, James Stottlemyer, and Kenneth Bonner. In summary, the Charging Party contends that there are 112 employees properly in the unit (40 listed on Exhibit 5 as modified, and 72 on Exhibit 6 as modified), and that the Union introduced 64 signed representation cards, representing a majority of employees in the unit on or about February 24, 1978, the date of request for recognition.

Respondents in their brief did not reach or discuss the question of how many employees are properly in the unit and primarily relied on defenses to the unfair labor practice allegations. To the extent Respondent has contested on the record, either the supervisory status of cer-

tain leadmen or the proper placement of employees in the unit, the record testimony has been carefully considered.

Certain preliminary matters should be noted before considering the issues of unit placement of named individuals and the effect of certain stipulations. I note for example that 21 of 25 alleged discriminatees signed union authorization cards and that conversely, four employees, Carol McCleary, Lynda Gorman, Robert Michaels and Denzil Linton, who were alleged as discriminatees, apparently did not sign union authorization cards. Secondly, five alleged discriminatees, namely, Linda Booth, Beverly Claar, Carol McCleary, Lynn Postlethwait, and Bonnie Thomas were listed on the Summit payroll of February 20-26, 1978, and were apparently rehired sometime prior to February 20, 1978. The original charges alleging discriminatory layoff or termination were filed on February 10, 1978 and served on February 13, 1978. The amended charges, alleging a refusal to bargain, were filed on March 8, 1978 and served on March 10, 1978.

The effect of stipulations. Ordinarily, the stipulation of the parties as to the status of employees on their inclusion in the unit will be given full effect, particularly in a representation proceeding and makes unnecessary litigation on those aspects. However, this is litigation on a complaint and in a number of instances in the record, there were stipulations received that a certain individual be excluded from the unit because he or she was no longer employed, was deceased or was discharged even though said events occurred *subsequent* to the date of requested recognition. Whether or not individuals were currently employed as of the date of the hearing *is irrelevant,* if in fact they were employed at the critical date, on or about February 24, 1978, and were in an employee

category deemed within the appropriate unit. Therefore, I have rejected some of these stipulations as improper and irrelevant. The only critical elements for me to decide are the total number of employees properly includable in the unit and the number of signed authorization cards at the critical time.

Charging Party's Exhibit 5. As to Exhibit 5, the parties stipulated that Elmer Hamrick, Ernest Kemppell, William Desatnik were supervisors and should be deleted. Further, in view of my prior findings that Donna Bolack was a supervisor, she too is deleted from Exhibit 5. The Union also contends that Frank Heisler is a supervisor. The only evidence in the record as to Heisler indicates that he was utilized as a die repair man. Absent evidence of supervisory attributes, he is included in the unit.

All parties were agreed that employees Carol McCleary, Bonnie Thomas, Linda Booth, Beverly Claar, and Lynn Postlethwait were properly stricken from Exhibit 5 because they were also listed on Exhibit 6, the Summit payroll for February 20-26, 1978. As I previously found that Denise Coontz was properly discharged on or about December 19, 1977, I shall also exclude her name from the list.

My review of Exhibit 5 reveals that the two page list totaled 55 employees, including the names of Mark Coontz and Gary Buckbee which were added by agreement. The Union contended that the amended list contained fifty names and that 10 should be deleted leaving 40 on the list as properly in the unit. Contrary to this contention, I find that Charging Party's Exhibit 5 contains 55 names (including Mark Coontz and Gary Buckbee), and deleting therefrom 10 names (rejecting the name of Heisler) leaves a total of 45 employees deemed properly includable in the unit on Exhibit 5.

Exhibit 6. The Charging Party contends that the list contains 91 names and that 19 of such names should be deleted, leaving a total of 72 names properly included in the unit. A review of the 19 names urged for deletion follows:

Alleged supervisors. (1) Dominic Romeo—the record reveals that Romeo was transferred from the 2nd shift of the jack division at Sumco shortly after the layoff and was returned to his position as a machine operator. As the layoff occurred on January 4, 1978, I find that Romeo had returned to his position as an employee in the die department at the time the Union requested recognition. Accordingly, I conclude that he was no longer a supervisor and was a part of the appropriate unit at the time recognition was requested on or about February 24, 1978.

(2) Norman Forshey—while the record established that Forshey succeeded to Romeo's job as 2nd shift foreman, the record (Tr. 537) indicates he succeeded to that post in the summer of 1978. As he did not function as a foreman on the critical date, I shall not exclude him from the unit. In addition, Guy Galloway who signed a card, admittedly succeeded Romeo as 2nd shift foreman after the January 4, 1978 layoff, until he in turn was replaced by Forshey. To be consistent and for majority purposes, therefore, I shall include Forshey in the unit and exclude Galloway, as well as Galloway's signed card, as I find him to be a supervisor.[21]

(3) Terry Cotton—the parties stipulated that Cotton was a supervisor and therefore he is properly excluded from the unit.

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21. See Tr. p. 505-506.

(4) The Charging Party contends that leadmen Raymond Roth, Lee Francis, Jr., Carl Lewis, John Mathia, Richard Seiter, Harold Queer, James Stottlemyer, and Kenneth Bonner all received wages equal to or in excess of that paid to Dominic Romeo and therefore they should be classified as supervisors. The Respondents deny these men held supervisory positions. The only testimony adduced as to such men establishes that they were skilled workmen who have none of the attributes of a supervisor. Wage rate standing alone, is not a conclusive factor in determining who are supervisors. Accordingly, I find that the previously enumerated leadmen are employees and properly in the unit.

Stipulations. The parties stipulated that Lynn Postlethwait, Larry (or Harry) Gough, Donald Emerson, and student-workers Philip Hendricks and Todd Pollock, should be excluded from the unit.

The basis for the Postlethwait stipulation was that he was no longer employed. Charging Party's Exhibit 6 establishes that Postlethwait was on the Summit payroll of February 20-26, 1978, and therefore, there being no other disability offered for his non-inclusion in the unit, I find that he is properly included in the unit.[22]

Larry (Harry) Gough. There was a similar stipulation by the parties that he was not in the unit because he had quit his job. The critical question is was he an employee in the unit on the critical date. I find he was and include him in the unit.

Donald Emerson. The parties stipulated to exclude him on the basis he was deceased. Whatever his present

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22. If he was excluded, his signed card would also be excluded.

status, i.e., now or at the time of the hearing, is irrelevant. The record established that he was employed as a full-time janitor at the critical time and is properly included in the unit for purposes of determining the Union's majority.

Kevin Whittaker. The parties stipulated that he left the Company and is now deceased. As previously discussed, what happened to employees subsequent to the critical period is immaterial, if in fact they are properly included in the unit. The record discloses that he was a full-time apprentice die maker. As I find he was in the unit at the critical time, he is properly includable in the unit for purposes of determining majority.

Philip Hendricks and Todd Pollock. The parties stipulated to exclude them from the unit on the ground they voluntarily quit their jobs. They were high school students working part-time under an OWE (outside work experience) program established by the Company with local high schools. The record (Tr. 539) indicates that almost the entire second shift was made up of OWE student-employees, ranging from 8 to 9 employees, that after they finished high school, they could work full-time and that approximately 75% stayed with the Company for a short time as full-time employees. As they were employed at the critical time and were regular part-time employees, their subsequent departure is irrelevant and I see no basis for deleting them from the unit.

David Dziados. The record establishes that he too was a student worker under the OWE program. However, he worked regularly 6 hours a day for 5 days a week over an extended period of time. I find that he was a regular part-time employee and properly includable in the unit.

Clarence Knapp. The record discloses that Knapp worked primarily for Harry Foley, the principal owner of the Respondents herein, on his farm and other related enterprises and that while he was listed on the Summit payroll, he worked only sporadically on the plant premises. It was conceded that 70 to 80% of his time was spent in working on special work assignments for Foley outside the plant. I find that he has no community of interest with the regular production and maintenance unit and will exclude him from the unit.

I agree that Charging Party's Exhibit 6 contains 91 names. For the reasons previously discussed, I conclude that Cotton, Galloway and Knapp are properly excluded from the unit. From a list of 91 names, the three individuals above are deleted, leaving a total of 88 names on Exhibit 6. Adding 88 to the 45 individuals found in the appropriate unit on Charging Party's Exhibit 5, the total number of employees in the appropriate unit is 133, of which a majority is 67.

Union authorization cards (whose validity was stipulated) were submitted as General Counsel's Exhibits 3 and 5 and established that as of February 24, 1978, the Union had signed cards from 62 employees (excluding Coontz and Galloway), five short of a majority. Additional cards were executed by Rick Cockenbaum on February 26, 1978, and by John Frost on February 28, 1978. Assuming *arguendo,* that the request for recognition, dated February 24, 1978 could not have been received before February 26, 1978 and further that Respondents' reply by return mail was received by February 28, 1978, and therefore these two cards should be counted, the addition

of two cards for a total of 64 would still fall short of a needed majority.[23]

As I have concluded that the Union did not have a majority at the time it requested recognition, I will dismiss the allegation of refusal to bargain.[24]

III. Conclusions of Law

1. The Respondents, Sumco Manufacturing Company, Inc., and Summit Grinding Company are a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondents were discriminatorily motivated in not adhering to seniority in selecting individuals to be laid off on January 4, 1978, and discriminatorily selected Ruth Duncan, Sandra England, Agness Tanner, Beverly Claar, Sheryl Legg and Betty Hoover for layoff and thereby violated Section 8(a)(3) and (1) of the Act.

3. The Respondents' hiring of new employees for Summit while former employees of Sumco were still on layoff during the period between January 13 and March 30, 1978, was discriminatorily motivated and an attempt to displace employees who favored the Union and constituted conduct violative of Section 8(a)(3) and (1) of the Act.

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23. The record does not disclose when Respondents replied to the request for recognition. As to the argument that there was a continuing demand for recognition and subsequently signed cards should be counted (e.g., cards signed by Nicholson on 3/6/78, Wright on 4/18/78 and Seiter on 5/8/78, it leaves uncertain what other changes may have occurred in the unit in the interim.

24. If a union majority had been established, in my view a *Gissel* bargaining order would be appropriate in light of the serious unfair labor practices found against Respondents.

4. The Respondents' offer to consider former employees of Sumco for employment with Summit as new probationary employees without their prior benefits was not timely, did not constitute a valid offer of employment and was discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.

5. The interrogation, and threats to discharge employees and comments that the plant will close or be moved somewhere else if the Union comes in or that Union supporters would be recalled, made by Donna Pollock and Dominic Romeo, and instances of interrogation and threats by William Desatnik, and Elmer Hamrick, each separately constitute violations of Section 8(a)(1) of the Act.

6. The Union did not represent a majority of employees on or about February 24, 1978, when recognition was requested.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondents have not otherwise violated the Act.

IV. The Remedy

The Recommended Order will require the Respondent to cease and desist from the unfair labor practices found, to offer reinstatement to the same job, or a comparable job or to a job for which they are qualified, to Sheila Smith, Betty Hoover, Dale Carder, Phyliss Young, Jayne Freiman, Diane Fridley, Ruth Duncan, Sandra England, Agnes Tanner, Connie Votaw, Mary Adamson, John Mesko, and Sheryl Legg, and to make whole the aforenamed employees and Linda Booth, Beverly Claar, and

Bonnie Thomas for any loss of earnings they incurred as the result of the unfair labor practices found herein.

In the case of employees Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover whom I found were discriminatorily selected for layoff out of seniority, their backpay shall run from the date of the layoff on January 4, 1978 until they received a valid offer of reinstatement, less any interim earnings. As to the remainder of the discriminatees their backpay period shall run beginning from the date employees were transferred from Summit to work on the jack division of Sumco or the date that new employees were hired for the jack division for jobs which former Sumco employees could perform whichever came first. The record indicates that at least two employees were transferred permanently to Sumco from Summit two or three weeks after the January 4, 1978, layoff, and that between January 13 and March 30, 1978, Summit hired 18 new employees, at least four of whom Bibby, Eldridge, Gaines, and Russell went to work in the jack division. Four others were were also hired—Reeves in the machine division, and Sullivan, Parsons and Johnson. The jobs in the jack division could have been filled by the Sumco employees on layoff. In determining which employees should have been hired, seniority shall be utilized and the individuals in question can be determined in compliance proceedings. As to other jobs for which new employees were hired at Summit, laid off employees of Sumco are entitled to backpay from the date they should have been employed in accordance with seniority, provided they were qualified to perform such jobs.[24a] The amounts of backpay are

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24a. Based on their experience and capability. Except for skilled jobs, e.g., welder or maintenance, it appears the jobs were relatively unskilled and subject to being filled by the discriminatees.

to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950), less any net earnings, with interest as set forth in *Florida Steel* Corp., 231 NLRB 651 (1977).[25] In carrying out the remedy provided herein, the Respondents shall be required to dismiss any employees hired subsequent to the January 4, 1978 layoff, if their hiring was for positions for which the laid off Sumco employees, found to be discriminatees herein, were qualified. If insufficient jobs still exist, a preferential hire list will be established for discriminatees.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:

ORDER[26]

Sumco Manufacturing Co., Inc., and Summit Grinding Company, of Mogadore, Ohio, their officers, agents successors and assigns, shall:

1. Cease and desist from:

(a) Discriminatorily selecting employees for layoff out of seniority because of their union activities or support for the Union;

(b) Hiring new employees for Summit for positions for which laid off Sumco employees were qualified to perform;

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25. See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

26. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Belatedly offering laid off Sumco employees an opportunity to be considered for employment with Summit as probationary new employees without their old wages and fringe benefits;

(d) Threatening employees with discharge or loss of breaks or stating that the plant will be closed or moved, or stating union supporters would not be recalled, because employees were supporting the Union;

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Make a valid offer of reinstatement to Sheila Smith, Betty Hoover, Linda Booth, Dale Carder, Phylis Young, Bonnie Thomas, Jayne Freiman, Beverly Claar, Diane Fridley, Ruth Duncan, Sandra England, Agnes Tanner, Connie Votaw, Mary Adamson, John Mesko, and Sheryl Legg,[27] discharging if necessary any employees hired by either Sumco or Summit after January 4, 1978, provided however, that these were positions for which the aforenamed persons were qualified, and make them whole with interest in the manner set forth in the Remedy portion of this Decision.

(b) Post at the plant premises of both Sumco and Summit in Mogadore, Ohio, copies of the attached Notice marked "Appendix."[28] Copies of said notice, on forms

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27. To the extent certain employees have been reemployed, their entitlement to remedies including backpay, would be modified accordingly.

28. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in

(Continued on following page)

provided by the Regional Director for Region 8, after being duly signed by Respondents' authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director, for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. April 15, 1980

/s/ JOHN C. MILLER
Administrative Law Judge

Footnote continued—

the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX E

Judgment Entry of the Court of Appeals For the Sixth Circuit

(Filed November 1, 1984)

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING COMPANY, INC., AND SUMMIT GRINDING COMPANY,
Respondents.

Before: EDWARDS and CONTIE, *Circuit Judges;* and PHILLIPS, *Senior Circuit Judge.*

JUDGMENT

ON APPLICATION FOR ENFORCEMENT of an order of the National Labor Relations Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that enforcement of the

decision of the said Agency in this cause be and the same is hereby granted.

It is further ordered that Petitioner recover from Respondent the costs on appeal, as itemized below.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk
/s/ AUDREY CROCKETT
Deputy Clerk

APPENDIX F

Order of the United States Court of Appeals For the Sixth Circuit Denying Petition For Rehearing En Banc

(Filed December 7, 1984)

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING INC., AND
SUMMIT GRINDING COMPANY,
Respondents.

ORDER

BEFORE: EDWARDS and CONTIE, *Circuit Judges,* and PHILLIPS, *Senior Circuit Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN HEHMAN
Clerk

APPENDIX G

Signed Union Cards

PLEASE USE TYPEWRITER OR PRINT PLAINLY

NAME Michael D. Goodpasture			HOME PHONE	784-9302
ADDRESS 220 Stevenson Lane	Akron		Ohio	44312
Street or Rural Route	City		State or Province	Zip Code

UNITED STEELWORKERS OF AMERICA

AFL-CIO - CLC

I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the United Steelworkers of America, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment, and to enter into contracts with my employer covering all such matters.

DATE 11/29/77 /s/ MICHAEL GOODPASTURE
(Signature)

EMPLOYED BY: Sum Co.
(Company) (Plant)

DEPARTMENT: Press Room SHIFT: 1

JOB TITLE: Press. Opt DATE HIRED: 9/15/77 RATE OF PAY 230

PLEASE USE TYPEWRITER OR PRINT PLAINLY

NAME Robert F. Hazlett			HOME PHONE	733-9740
ADDRESS 2363 Mishler		Akron	Ohio	4312
Street or Rural Route		City	State or Province	Zip Code

UNITED STEELWORKERS OF AMERICA

AFL-CIO - CLC

I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the United Steelworkers of America, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment, and to enter into contracts with my employer covering all such matters.

DATE 11/29/77 /s/ ROBERT F. HAZELETT
(Signature)

EMPLOYED BY: Sumco Mfg.
(Company) (Plant)

DEPARTMENT: Press room SHIFT: 1#

JOB TITLE: Stock Boy DATE HIRED: 10/23/77 RATE OF PAY $2.30

PLEASE USE TYPEWRITER OR PRINT PLAINLY

NAME Lyn Postlewaite HOME PHONE 6289074

ADDRESS 917 Waterloo Suffield Ohio 44260

Street or Rural Route | City | State or Province | Zip Code

UNITED STEELWORKERS OF AMERICA

AFL-CIO - CLC

I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the United Steelworkers of America, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment, and to enter into contracts with my employer covering all such matters.

DATE 12-29-77 /s/ Lyn Postlewaite

(Signature)

EMPLOYED BY: Sumco Mfg

(Company) (Plant)

DEPARTMENT: facttree SHIFT: 2

JOB TITLE: Stock Boy DATE HIRED: ..... RATE OF PAY $2.30

APPENDIX H

Notice of Summit Grinding & Machine Co.
To Employees

Phone: Akron 628-2663 (area code 216)

SUMMIT GRINDING & MACHINE COMPANY

"Screw Machine Products To Your Specifications"
- - "General Machine Work"

3991 Mogadore Road
Mogadore, Ohio 44260
February 22, 1978

N O T I C E

Effective Monday February 27, 1978, all production, assembly and maintenance operations of Sumco Manufacturing Company will be transferred to the Summit Grinding and Machine Company.

All employees of Sumco Manufacturing Company as of February 22, 1978 are eligible to transfer their employment without loss of benefits, wage rates, or seniority.

Those employees desiring to make the transfer must contact the Eployment Manager, Bob Mc Artor, at Summit Grinding and Machine Company no later than 5:00 P.M., Friday, February 24, 1978. W-4 statements will be signed and clock card numbers will be assigned at that time.

Summit Grinding & Machine Co.
/s/ HARRY WM. FOLEY
Harry Wm. Foley
President

APPENDIX I

Series of Motions and Orders Filed in the Sixth Circuit

No. 80-1686

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO., INC.
SUMMIT GRINDING COMPANY,
Respondent.

MOTION FOR RESPONDENT

Pursuant to FRAP R. 30 (f), respondent respectfully moves the Court for an order, to dispense with a joint appendix in the above-entitled appeal, and for leave to proceed in this cause on the original record.

WHEREFORE, respondent prays the Court for an order accordingly.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney for
Respondent

CERTIFICATE OF SERVICE

The foregoing motion was duly served on the petitioner, this 7th day of March, 1984, by mailing two (2) copies thereof to its counsel, Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C., 20570, first Class US Mail, postage prepaid, at Akron, Ohio.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney

CC: Rector Assoc.
JO/t

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS

SUMCO MANUFACTURING, INC., *et al.*,
Respondents.

ORDER

(Filed March 15, 1984)

Upon consideration of the respondents' motion for leave to dispense with the joint appendix,

It is ORDERED that the motion be and it hereby is denied pursuant to Rule 11(e), Rules of the Sixth Circuit,

It is further ORDERED that the respondents file the joint appendix on or before March 29, 1984.

ENTERED PURSUANT TO RULE 4(f),
RULES OF THE SIXTH CIRCUIT.
John P. Hehman, Clerk
/s/ LEONARD GREEN
Leonard Green, Chief Deputy Clerk

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING, INC. *et al.*,
Respondents.

MOTION FOR RECONSIDERATION

Pursuant to 6th Cir. R. 8 (c) respondents respectfully move the Court for reconsideration of order, filed March 15, 1984, to file a joint appendix on or before March 29, 1984.

Respondents are unable to comply therewith, inasmuch as they have never received nor been served with a designation by the petitioner, NRLB. (FRAP R. 30).

WHEREFORE, respondents pray the Court for an appropriate order or relief.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney for
Respondents

CERTIFICATE OF SERVICE

The foregoing motion was duly served on the petitioner, NRLB, this 23d day of March 1984, by mailing a copy thereof to Elliott Moore, Esq., Deputy Associate General Counel, NRLB, Washington, D. C. 20570, first class US Mail, postage prepaid at Akron, Ohio.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO., INC. *et al.*,
Respondents.

RESPONDENTS MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION, OF CLERK'S ORDER AGAINST RESPONDENTS TO FILE JOINT APPENDIX BY MARCH 29, 1984.

In support of motion for reconsideration, separately filed, of the Clerk's order filed March 15, 1984, denying respondents motion for leave to proceed on the original record, in lieu of a joint appendix, and ordering that respondents file a joint appendix on or before March 29, 1984, it is respectfully submitted:

FRAP 30 (c), provides in part:

* * * "the provisions of subdivision (b) of this Rule 30, shall apply, except that the *designations referred to herein shall be made by each party at the time his brief is served.*" * * * (emphasis added)

Sixth Circuit, Appellate Practice Institute, Sourcebook, Noc 11, 12, 1983, at *p. 13*:

"2. The contents designation process

"Rule 11 does not specifically spell out a process for designating the contents of the appendix. By setting

the date for the filing of the appendix at 21 days after the filing of appellee's brief, however, *the Rule makes it possible for counsel to use the Federal Rule 30 (c) procedure of serving designations with briefs.*"

No such designation was ever served by the NRLB, on the respondents.

* * *

It is unclear under *6th Cir. R. 22*, providing for the juxtaposition of the parties, in labor enforement cases, (Petitioner vis-a-vis Respondent, and vica versa) whether it devolves on the respondent to prepare and file a joint appendix, inasmuch as the rule is silent thereon. In other words, *6th Cir. R. 22*, makes no mention of "joint appendix". Otherwise, ordinarily the burden to prepare and file a joint appendix, properly falls on the petitioner, or the appellant. (FRAP 30).

In any event, the respondents here are precluded from filing a joint appendix, as ordered by the Clerk, without a designation of the record, from the NRLB.

Accordingly the Clerk's order of March 15, 1984, upon the respndents to file a joint appendix by March 29, 1984, should be vacated and set aside, and a further appropriate order issued.

Respectfully submitted,

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney for
Respondents

CERTIFICATE OF SERVICE

The foregoing memorandum was duly served on the petitioner, NRLB, this 26th day of March 1984, by mailing a copy thereof to Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570, first class US Mail, postage prepaid at Akron, Ohio.

Dated this 26th day of March 1984, at Akron, Ohio.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney

CC: Rector Associates
Akron, Ohio

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202

JOHN P. HEHMAN
Clerk

Telephone
(513) 684-2953
FTS 684-2953

May 1, 1984

Mr. Joseph O'Leary
Kruger Plaza
Portage Lakes
432 W. Turkeyfoot Lake Road
Akron, Ohio 44319

Re: Case No. 80-1686 - National Labor Relations Board v. Sumco Manufacturing Inc., and Summit Grinding Company

Dear Mr. O'Leary:

The court is in receipt of your motion for reconsideration of the clerk's order of March 15, 1984 which denied leave to dispense with filing the joint appendix. The memorandum you have tendered in support of the motion indicates that you are unable to file the appendix because the NLRB has not designated the parts of the record that it wishes to be included.

Under Sixth Circuit Rule 11(c) the appellant is to file the joint appendix within twenty-one (21) days of the filing of the appellee's brief. The appellee's brief will have all references to the record which the appellee wishes to cite to the court. Those portions of the record referred to in the appellee's brief are to be referred to in the joint appendix. This eliminates the need for formal designation.

Accordingly, the joint appendix in this case should be filed not later than May 18, 1984. No ruling will be necessary on your motion.

Very truly yours,

/s/ JUANITA S. TEMPLE
Juanita S. Temple
Case Manager

pe

cc: Mr. Elliott Moore
Ms. Linda Weisel
Mr. Bernard Levine
Mr. Harvey B. Rector

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO., INC.
SUMMIT GRINDING COMPANY,
Respondent.

MOTION FOR RESPONDENT

Respondent respectfully moves the Court for an order to require the petitioner, NRLB, to furnish and file a designation of the contents of the record, for purposes of preparing a joint appendix, as provided by *FRAP R. 30(c)*, notwithstanding *Sixth Circuit Rules 11 and 22,* or otherwise, and notwithstadning *Sixth Circuit letter, dated May 1, 1984,* /S/ Juanita S. Temple, Case Manager.

WHEREFORE, respondent prays the Court for an order accordingly.

/s/ JOSEPH O'LEARY
Joseph O'Leary
Kruger Plaza, Portage Lakes
Akron, Ohio 44319
(216) 644-3608
Attorney for Respondent

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO., INC.
SUMMIT GRINDING COMPANY,
Respondent.

MEMORANDUM FOR RESPONDENT

In support of respondent foregoing motion, it is respectfully submitted:

That, suffice it to state respondent cannot undertake, consistent with sound legal practice, to reproduce from the record a joint appendix, based on the petitioner NLRB references or citations to the original record, in its brief, absent a designation. *16 Federal Practice and Proceedure, # 3945 et seq., R. 1, FRAP Scope of Rules*:

> * * * "proceedings for review or enforcement of orders of federal administrative agencies, boards, commissions and officers;" * * *

3966, Applicality of Rules to Agency Review Cases—

> * * * Thus R. 20, (FRAP) * * * imposes on agency and enforcement proceedings the general rules applicable to appeals from judgments of district courts. * * * *Among the rules that do remain applicable* and that were designed to encompass agency proceedings in particular *are Rule 30(c) dealing with the alternative*

method of designating contents of the appendix." * * * (emphasis added)

Bonner v. City of Pritchard, Ala. 661 F 2d 1206, 1211 (CA 11, 1981):

"28 USCA # 2071. Rule 47 of the Federal Rules of Appellate Procedure, adopted under that authority, authorizes the judges of the circuit to make rules of practice *not inconsistent with FRAP*," * * * (emphasis added)

But see: *Amstar Corporation v. S/S Alexandros T,* 664 F2d 904 (CA 4 1981):

"Rule making, however, is a legislative or administrative function rather than an act of adjudication. Indeed the Supreme Court has stated:

" 'The fact that this Court promulgated the (Federal rules of Civil Procedure) as formulated and recommended by the Advisory Committee *does not foreclose consideration of their validity, meaning or consistency.*' "

"The duty to consider a rule's validity is not limited to the Supreme Court." (emphasis added)

Accordingly, it appears that respondent has standing to attack the application of the rules here. It would further appear that *Sixth Circuit Rules 11 and 22,* as applied to the case here, are inconsistent with *FRAP R. 30* (c), and deny due process of law, *Fifth Amendment, U. S. Const.*

Finally, see: *50 The George Washington Law Review, 135, 142-3* (1982) "Informed Decisions" by *Circuit Judge Wald* of the District of Columbia Circuit:

* * * "Agencies * * * *often fail to refer to the relevant underlying documents in the record that support or*

> *contradict their rationale.* * * * We do receive joint appendices containing the documents that the parties feel are important enough to reproduce, *but they are not usually organized in terms of their relevance to the arguments in the briefs.*" (emphasis added)

which is precisely the position of the respondent here—insofar as attempting to reproduce a joint appendix from the record is concerned, based on the opposing party's citations thereto in its brief.

In short, how does the respondent know what part or parts, if any, of the record the petitioner contends supports its position, absent a designation?

50 *The George Washington Law Review,* supra,: cont'd:

> "Thus a conscientious record search in a lengthy agency proceeding—time restraints aside—too often resembles a safari through uncharted lands without benefit of a guide."

CONCLUSION

The safari through the record here in support of the petitioner, NRLB, can best be conducted by the petitioner itself via a designation, as provided by FRAP R. 30(c).

* * *

CERTIFICATE

The foregoing motion and memorandum were duly served on the petitioner NRLB, this 15th day of May 1984, by mailing a copy thereof to its attorney, Elliott Moore, Esq., Deputy Associate General Counsel, NRLB, Washington, D. C., 20570, first class US Mail, postage prepaid at Akron, Ohio.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING, INC., AND
SUMMIT GRINDING COMPANY,
Respondents.

ORDER

(Filed July 13, 1984)

The respondent moves the court for an order requiring the petitioner, National Labor Relations Board, to designate those portions of the record it wants included in the joint appendix.

It appearing that Rule 11, Rules of the Sixth Circuit, contemplates that the joint appendix will contain all record items referred to in either brief and that the petitioner's brief was filed on February 15, 1984,

It is ORDERED that the motion be and hereby is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
John P. Hehman, *Clerk*

No. 80-1686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMCO MANUFACTURING CO. INC.
SUMMIT GRINDING COMPANY,
Respondents.

WAIVER

Pursuant to order made and entered August 31, 1984, which states in part:

> "It is ORDERED that counsel for the respondents file a joint appendix on or before September 14, 1984. Failure to comply shall result in enforcement of the Board's order."

accordingly, appearance and oral argument before the Court on September 28, 1984, is hereby waived.

It is respectfully submitted,

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney for
Respondents

CC: Rector Assoc.
JO/t

CERTIFICATE OF SERVICE

The foregoing waiver was duly served on the petitioner, National Labor Relations Board, this 15th day of September 1984, by mailing two (2) copies thereof to Elliott Moore, Esq., Deputy Associate General Counsel, first class US Mail, postage prepaid, at Akron, Ohio.

/s/ JOSEPH O'LEARY
Joseph O'Leary, Attorney

APPENDIX J

Compliance Correspondence From NLRB

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

November 19, 1984

Mr. Harvey B. Rector
4755 Manchester Rd.
Akron, Ohio 44319

RE: SUMCO MANUFACTURING COMPANY, INC. & SUMMIT GRINDING COMPANY
CASE NO. 8-CA-17702

Dear Mr. Rector:

Pursuant to our conversation Friday, I would like to request the information as described below. Furthermore, I would like to inform you of certain facts as explained later.

As you're aware, the U.S. Sixth Circuit Court of Appeals has upheld the Board's Supplemental Backpay decision in the above matter.

1. As specified in that decision, the Respondent's backpay liability stood at $117,099.63 on June 30, 1982.

I will soon be computing the additional backpay liability from June 30, 1982, until such time that the Respondent makes lawful and unconditional offers of reinstatement to S. England, A. Tanner, S. Legg Morgan, H.

Hoover Morhidge, S. Smith, D. Carder, P. Young, D. Fridley Hahn, C. Votaw Ritter, M. Adamson, L. Booth Kring, and J. Mesko.

THE RESPONDENT *MUST* MAKE PROPER AND UNCONDITIONAL OFFERS OF RESINSTATEMENT TO THOSE EMPLOYEES IN ORDER TO TOLL ITS BACKPAY LIABILITY.

2. The Respondent's backpay liability of $117,099.63 has already amassed an additional $76,761.71 in interest monies,[1] which WILL CONTINUE TO ACCRUE UNTIL PAYMENT IS MADE IN FULL. That interest is now accruing at a rate of about $1,268.19 per month, which doesn't reflect interest on the backpay liability after June 30, 1982.

3. In accordance with the Court's decision, I am now requesting immediate payment of the following amounts:

	EMPLE	LIABILITY[2]	DECEMBER 31, 1984 INTEREST[3]
1.	Mary Adamson	$ 3,395.19	$ 2,555.36
2.	Dale Carder	2,268.77	1,376.13
3.	Beverly Claar	616.00	486.76
4.	Ruth Duncan	2,154.45	1,690.18
5.	Sandra England	7.924.74	5,364.02
6.	Jane Freiman	515.20	407.11
7.	Diane F. Hahn	15,483.23	9,197.30
8.	Linda B. Kring	8,704.55	5,723.44
9.	John Mesko	6,233.74	4,624.95
10.	Sheryl L. Morgan	18,301.45	12,340.00

1. Effective December 31, 1984.
2. Subject to deductions.
3. *Not* subject to deductions.

11.	Betty H. Morhidge	14,166.92	9,578.17
12.	Connie V. Ritter	1,278.76	980.45
13.	Sheila Smith	25,442.58	15,581.86
14.	Agnes Tanner	7,510.85	4,338.12
15.	Phyllis Young	3,133.20	2,517.86
	TOTALS	$117,099.63	$76,761.71
			$193,861.34

4. Regarding your comments that Respondent intended to, or already had in fact, filed for bankruptcy, and/or prepared to liquidate its assets, please be advised of the following:

A. The Region has filed a lien against Respondent for the above liability.

B. Of course, any alter-ego disguised continuance, or successor to Respondent will also be liable for the Court's Order.

C. Should Respondent attempt to dissipate its assets to avoid compliance; personal liability, execution proceedings, and/or other litigation may be pursued, including contempt proceedings which could result in fines and/or incarcaration.

5. If justified by evidence, including affidavit testimony, and an audit of all financial records, a short term payment plan may be possible.

6. In accordance with the Court's Order, I am requesting the following documentation to be received in this office no later than close of business Monday, December 3, 1984:

A. Copies of the monthly employment rosters for Sumco and for Summit Grinding for each month from July 1, 1982 through December 1, 1984.

B. A list of any pay raises granted since July 1, 1982 showing amounts, dates, and which employees were affected.

C. Copies of payroll records showing total weekly work hours and weekly gross pay for each employee included in Item "A" above, from July 1, 1982 to the present time.

D. Any next-of-kin information available for Sheila Smith and Jayne Freiman.

Your immediate attention to, and cooperation with, this matter will be appreciated.

Very truly yours,

/s/ WARREN BELLAMY
Warren Bellamy
Compliance Officer

WB:dms
cc: Mr. Harry Foley, Pres.
3985 & 3991 Mogadore Rd.
Mogadore, Ohio 44260

Joseph O'Leary, Esq.
438 W. Turkeyfoot Lake Rd.
Akron, Ohio 44319

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

December 27, 1984

Harry Schwab, Esq.
Schwab, Wilson, Grosenbaugh,
Fort & Seamon
40 East Mill St.
Akron, OH 44308

Re: Sumco Manufacturing Co., Inc.
& Summit Grinding Company

Case No. 8-CA-11702

Dear Mr. Schwab:

By now I am sure that you too have received a copy of the Court of Appeals mandate in the above-captioned matter.

Accordingly, I would like to renew my requests of November 19 and December 3, 1984, for the information cited therein regarding the Employer's alleged inability to remit its backpay liability and/or reinstate the respective discriminatees.

Specifically, I would like to request the following information:

1. In light of the Employer's prior threats to liquidate the business, please explain and document what, if any, provisions have been made to protect the Board's backpay claims?

2. Monthly employment rosters showing *all* employees, by name and job classifications, for both Sumco and Summit, since July 1, 1982.

3. Copies of payroll records showing weekly gross pay, total weekly work hours, effective pay rate(s), for *each* of the above employees, since July 1, 1982.

4. Copies of all financial records, ledgers, and the underlying receipts, invoices, and other documents, as well as balance sheets, audits including those which are certified, profit and loss statements, tax returns, and affidavit testimony thereto by Mr. Foley as well as any other related witness (such as bankers) for both Sumco and Summit, since January 1, 1978.

5. Any secured offer by Respondent to comply with the above mandate, including the commencement of installment payments, remittance of more than 80% of the liability, and immediate offers of reinstatement to the respective discriminatees.

Your cooperation with this request by submitting the above information to be received prior to close of business, Thursday, January 10, 1985, will preclude the initiation of such other action as may be deemed appropriate. I look forward to your response in this matter.

Very truly yours,

Warren Bellamy
Compliance Officer

WB/pg
cc: Stanley R. Zirkin, Esq.
Deputy Assistant General Counsel
Contempt Litigation Branch
Washington, D.C. 20570

Mr. Harvey B. Rector
Rector & Associates
4755 Manchester Rd.
Akron, OH 44319

Mr. Harry Foley
Sumco Manufacturing Co.
3985, 3991 Mogadore Rd.
Akron, OH 44260

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

January 31, 1985

Harvey Rector, President
Rector & Associates
4755 Manchester Rd.
Akron, OH 44319

Re: Sumco Mfg. Co., et al.
Case No. 8-CA-11702

Dear Mr. Rector:

I am in receipt of your letter dated January 28, 1985.

In confirmation of my conversation with Brian last Friday, I would not, and cannot "approve" of this or any other proposed letter offering reinstatement to the discriminatees.

As I also told Brian, the requirements of any reinstatement offer include the rention of full seniority and other benefits which were lost during the period of litigation; as well as their placement into their same jobs, or if those positions "no longer" exist, to substantially equivalent jobs.

My opinion, as related to Brian, is such that the Employer herein should adhere to the strictest interpretation of the above guidelines, both in order to toll its already significant backpay liability; and to avoid a repetition of reinstatement complications as have already been litigated successfully against the Employer in this case.

Please send me a copy of your Writ of Certiorari, which as you know, is due to be filed on or before February 1, 1985.

Very truly yours,

/s/ WARREN BELLAMY
Warren Bellamy
Compliance Officer

WB:aab

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

February 7, 1985

Mr. Harry Foley, President
Sumco Mfg. Co. & Summit Grinding
3985 & 3991 Mogadore Rd.
Mogadore, OH 44260

Re: Sumco Mfg. Co. & Summit Grinding
Case No. 8-CA-11702

Dear Mr. Foley:

I am pleased to inform you that I have located Jayne Freiman and Sheila Smith and have discussed their backpay entitlement in the above-captioned matter. Ms. Freiman's records indicate that she is, in fact due the $515.20 as specified previously.

Ms. Smith, however, has reported interim earnings which have decreased her $25,442.58 as specified in the Supplemental Decision, as enforced, to an amount slightly

less than $3,000.00. This has also resulted in a decrease from the $117,099.63 total liability arising from the back-pay period alleged in that Specification to $94,553.20, excluding interest.

It is my belief that a settlement can be obtained in that matter whereby the liability can be reduced further to $75,642.56, excluding interest, IF PAYMENT IS MADE, OR INSTALLMENTS BEGUN *IMMEDIATELY*. Such an installment plan could be concluded if it is secured by collateral, and your financial condition warrants such consideration.

Only by such prompt action can the Employer reduce the further accrual of interest which is now compounding at $1,024.29 *each month*. Aside from alleviating this burden, the Employer can also avoid the costs and/or penalty, which might include incarceration, resulting from contempt proceedings. Of course, the Agency can also initiate foreclosure proceedings or other litigation as it deems appropriate.

It does not appear possible that anything else can be said which is more convincing than the above, in order to induce you to resolve this matter. I hope that you will agree that such a settlement promotes the self-interests of all parties in this matter.

Finally, as you may recall, the judge dictated that the Specification hearing be reopened within one year of compliance, which of course has not yet commenced, for the purpose of clarifying the entitlements of Ms. Freiman and Ms. Smith. In light of my contact with them, it seems to me that your interests, as well as the Agency's could best be served by stipulating the appropriateness of their entitlements, and thereby avoid the costs inherent in further litigation.

I have therefore, enclosed a proposed Stipulation, whereby we can avoid the necessity of further litigation. Please review the Stipulation, and prior to close of business, Thursday, February 28, 1985, submit a signed, dated and notarized copy, if you so desire. If modifications are desired, then please notify me of your proposals prior to that date. If you have not executed the Stipulation, or proposed modifications to it prior to the end of the month, then we will take appropriate action.

Your cooperation in these matters would be appreciated.

Very truly yours,

/s/ WARREN BELLAMY
Warren Bellamy
Compliance Officer

WB:aab
Enclosure
cc: Harry B. Rector
4755 Manchester Rd.
Akron, OH 44319

Harry Schwab, Esq.
Schwab, Wilson, Grosenbaugh,
Fort & Seamon
40 East Mill Street
Akron, OH 44308

Joseph Oertel, Esq.
Contempt Litigation Branch
National Labor Relations Board
Washington, D. C.

STIPULATION

WE hereby waive our right to reopen the Supplemental Backpay Specification Hearing in Case No. 8-CA-11702, *Sumco Manufacturing Co., Inc. & Summit Grinding Company,* for the purpose of examining Ms. Jayne Freiman and Ms. Sheila Smith.

WE instead concur to the appropriateness of their entitlement to the amounts below which were incurred during the backpay periods specified by their respective names:

CLAIMANT	BACKPAY PERIOD	NET BACKPAY AMOUNT
Freiman, Jayne	March 1, 1978 - April 3, 1978	$ 515.20
Smith, Sheila	March 6, 1978 - June 30, 1982 (untolled)	$ 2,896.15

WE therefore agree that the $25,442.58 liability which was attributed to Ms. Sheila Smith in the Supplemental Decision should instead be reduced accordingly to the amended amount above of $2,896.15.

SUMCO MFG. CO., INC. & SUMMIT GRINDING CO.

Office - Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1416

In the Supreme Court of the United States

OCTOBER TERM, 1984

SUMCO MANUFACTURING CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

9pp

TABLE OF AUTHORITIES

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Statute, regulations and rules:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2

§ 8(a)(3), 29 U.S.C. 158(a)(3) 2

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3d Cir. R. 26 5

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5th Cir. R. 7 5

6th Cir. :

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8th Cir. R. 27 5

9th Cir. R. 24 5

11th Cir. R. 9 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1416

SUMCO MANUFACTURING CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioners, who were found to have committed unfair labor practices, contend, first, that a backpay award was improper, and second, that they were prejudiced by a Sixth Circuit rule that treats parties seeking to avoid enforcement of orders of the National Labor Relations Board as petitioners for certain limited purposes.

1. Petitioners Sumco Manufacturing Co., Inc. and Summit Grinding and Machine Co.[1] are Ohio corporations engaged in the manufacture of automobile jacks and related parts. In 1977 and 1978 Sumco employees undertook a

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[1]The decisions below refer to "Summit Grinding Company." Petitioners state (Pet. 3) that "no such corporation" exists and that the company's actual name is Summit Grinding and Machine Co.

campaign to obtain union representation. The Board found that Sumco and Summit (hereinafter jointly referred to as Sumco) constituted a single employer and that it violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by laying off six employees due to their union activity and by hiring or transferring new employees to job vacancies before recalling 10 other laid-off employees who supported the union campaign.[2] The Board ordered that valid offers of reinstatement be made to each of the 16 employees and that each be made whole for any losses incurred by reason of Sumco's unlawful conduct. Pet. App. A81-A86. The court of appeals enforced the Board's order in full in 1982 (Pet. App. A3).

2. The Board then instituted a proceeding pursuant to 29 C.F.R. 102.52-102.59 to determine the amounts of backpay due the 16 employees. The Board's Regional Director issued a backpay specification calculating the amounts owed. Following a hearing, an administrative law judge (ALJ) concluded that Sumco had failed either in its answer to the specification or at the hearing to state any basis for disagreement with the Regional Director's backpay formula and figures or to offer any alternative to them. Accordingly, the ALJ granted the General Counsel's motion for summary judgment, awarding the amounts contained in the specification. Pet. App. A7. The ALJ further concluded that Sumco had not made valid offers of reinstatement to any of the 16 employees, that it had failed to show that any of them had failed unjustifiably to seek or accept interim employment, and that Sumco had failed to show that an

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[2]The Board also found that Sumco violated Section 8(a)(1) of the Act by interrogating and threatening employees due to their union activity, by promising them raises if they stopped supporting the union, and by enforcing plant rules more strictly against union supporters (Pet. App. A33, A82).

alleged loss of business precluded it from offering them jobs (*id.* at A8-A29).

The Board adopted the ALJ's backpay decision and ordered Sumco to make the employees whole through June 30, 1982, in the amounts determined by the ALJ. The Board's order also provided that Sumco's backpay liability continues until it makes valid offers of reinstatement to the employees, with the amount of backpay accruing after June 30, 1982, to be determined in supplemental proceedings if necessary. Pet. App. A25.[3]

3. The Board applied to the court of appeals for enforcement of its backpay order. Sumco, which was required under Sixth Circuit Rules 22 and 11 to file the opening brief and to prepare and submit a joint appendix after the Board's brief was filed, moved "to dispense with a joint appendix * * * and * * * to proceed * * * on the original record" (Pet. App. A94). The court of appeals denied Sumco's motion (*id.* at A95). Thereafter, in response to Sumco's claim that it could not file a joint appendix because it did not know what materials to include, the court instructed Sumco on two separate occasions that the joint appendix should include those portions of the record referred to in the parties' briefs (*id.* at A100, A105). Sumco failed to file a joint appendix and waived oral argument (*id.* at A106).

The court of appeals enforced the Board's supplemental backpay decision (Pet. App. A1-A2). The court noted that "the argument advanced by [Sumco] appears essentially to reargue the unfair labor practice case which has previously been finally decided against [it]" and also "that the

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[3]Petitioners did not include in the appendix to their petition the Board's decision and order adopting the ALJ's recommended backpay decision. The Board's decision is reported at 267 N.L.R.B. 253 (1983).

company belatedly has sought to raise contentions concerning backpay which should have been raised before the Board * * * [and] cannot be adjudicated on appeal by this court" (*id.* at A2). The court stated that "[a]n additional reason for [its decision] is that counsel for [Sumco] failed to file a joint appendix * * * as ordered by this court" (*ibid.*).

4. Petitioners contend (Pet. 10) that the Board's order that backpay liability will continue to run until valid reinstatement offers are made is "confiscatory" and "punitive." This contention is based on the unsupported assertion, rejected by the ALJ (Pet. App. A14-A16), that Sumco no longer had work that the 16 employees could perform at the time of the backpay proceeding. This fact-bound issue does not warrant review by the Court.[4]

5. Petitioners also contend (Pet. 7-10) that the Sixth Circuit's rules that require that the party challenging a Board order file the opening brief and prepare a joint appendix are "designed to shift the burden of proof to the Respondent(s) in NLRB cases * * * and [are] contrary to due process of law as guaranteed in the Fifth Amendment" (*id.* at 8). That contention lacks merit and does not warrant review by this Court.

Sixth Circuit Rule 22 provides that "[i]n an application for enforcement by the National Labor Relations Board under Rule 15(b), Federal Rules of Appellate Procedure, the respondent(s) shall be considered the petitioner(s), and the NLRB considered the respondent, for the purposes of

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[4]In addition, to the extent that petitioners contend that the Board's underlying unfair labor practice finding and remedial order "were not based on substantial evidence" (Pet. 6), or were otherwise improper, their time for filing a petition for certiorari to review the court of appeals' judgment enforcing the Board's decision in the underlying unfair labor practice case has long since expired.

briefing and oral argument, unless the court orders otherwise." Federal Rules of Appellate Procedure 30 provides that "[t]he appellant shall prepare and file an appendix to the briefs" containing relevant parts of the record, and Sixth Circuit Rule 11(c) provides that "[t]he appellant shall serve and file the joint appendix within twenty-one (21) days of the filing of the appellee's brief." Thus, under these rules Sumco was required to file the opening brief and, after the Board's brief was filed, to prepare and file a joint appendix containing the portions of the record referred to in the briefs.

Contrary to petitioners' contention, they were not denied due process by the Sixth Circuit's "flip" rule in Board enforcement cases. Similar rules have been adopted in many circuits.[5] These rules neither shift the burden of proof to parties contesting the Board's decision nor alter the standards of review by which courts of appeals are to judge whether Board orders are entitled to enforcement. Rather, such rules are simply reasonable means of pinpointing the issues on appeal by requiring the contesting party to set forth its contentions in an opening brief and allowing the Board to respond specifically in its brief. Moreover, such rules afford the contesting party an opportunity that it would not otherwise have to respond by filing a reply brief.[6]

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[5]All circuits except the Tenth Circuit and District of Columbia Circuit have adopted "flip" rules similar to Sixth Circuit Rule 22 in cases where the Board applies for enforcement. See lst Cir. R. 22; 2d Cir. R. 15; 3d Cir. R. 26; 4th Cir. R. 22; 5th Cir. R. 7; 6th Cir. R. 22; 7th Cir. R. 9(j); 8th Cir. R. 27; 9th Cir. R. 24; 11th Cir. R. 9.

[6]Petitioners' contention (Pet. 7, 10) that the Board refused to cooperate in supplying designations for the joint appendix is erroneous. The Board, as is its practice and as the court of appeals instructed Sumco on two occasions, informed counsel for Sumco that the joint appendix was to contain those portions of the record cited in the briefs. Petitioners' apparent further contention (Pet. 7-8) that the court of appeals did not

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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General Counsel

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properly consider the record underlying the Board's backpay decision *because* it did not have the benefit of a joint appendix is equally groundless. As the court made clear (Pet. App. A2), it fully considered the briefs and the record in enforcing the Board's order.

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